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APPENDIX

IN THE

Supreme Court of the United States

October Term, 1968

No. 492

CLARENCE BRANDENBURG,

Appellant,

v.

STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

FILED SEPTEMBER 9, 1968
JURISDICTION NOTED NOVEMBER 18, 1968

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Relevant Docket Entries

Court of Common Pleas

Sep. 28, 1964	Min. 843 Plea of not guilty entered—Bond $1,000.00
Jan. 19, 1965	Motion to Quash filed
Dec. 5, 1966	Guilty as charged in the Indictment
Dec. 8, 1966	Motion for New Trial Filed
Jan. 5, 1967	Image 36 Sentence—Ohio Penitentiary 1-10 years, Fine $1,000.00 and costs. Defendant released on Same Bond Pending Appeal.
Jan. 13, 1967	Image 88 Entry overruling Motion for New Trial
Jan. 14, 1967	Notice of Appeal Filed—CA 10147
Jan. 14, 1967	Precipe for Docket and Journal entries Filed

Court of Appeals

Feb. 16, 1968	Minute #39—Judgment affirming judgment of Common Pleas Court and mandate to Common Pleas Court.

The Supreme Court of Ohio

Mar. 4, 1968	Notice of Appeal filed
May 9, 1968	Hearing on Motion for Leave to Appeal
Jun. 12, 1968	Motion for Leave to Appeal, Overruled J. 48-672
Jun. 12, 1968	Dismissed, Sua Sponte, No Substantial Constitutional Question Involved. J. 48-678

Indictment

THE STATE OF OHIO,
HAMILTON COUNTY

THE COURT OF COMMON PLEAS OF HAMILTON COUNTY: Term of July in the year nineteen hundred and sixty four.

HAMILTON COUNTY, ss.

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths present that Clarence Brandenberg on or about the twenty eighth day of June in the year nineteeen hundred and sixty four at the County of Hamilton and State of Ohio, aforesaid, did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

SECOND COUNT

And the Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio upon their oaths do further present that Clarence Brandenberg on or about the twenty eighth day of June in the year nineteen hundred and sixty four at the County of Hamilton and State of Ohio, aforesaid did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

RAYMOND E. SAMSON
Prosecuting Attorney
Hamilton County, Ohio

Motion to Quash

[Filed January 19, 1965]

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

CRIMINAL DIVISION

No. 85024

STATE OF OHIO,

Plaintiff,

v.

CLARENCE BRANDENBURG,

Defendant.

Comes now Clarence Brandenburg by and through Peter Outcalt, his attorney, and moves the court to quash the indictment in this case under which he is charged with violating Section 2923.13 RC by reason of a certain defect apparent on the face of the record in this case, to-wit: The indictment herein charges the Defendant with the violation of a statute which is not constitutional inasmuch as said statute denies the Defendant's rights as set forth in the first and fourteenth amendments to the United States Constitution. Furthermore, the Smith Act as amended, 18 USC 2385 which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence supersedes the inforcibility of the Ohio Criminal Syndicalism Act (Section 2923.13 RC) which proscribes the same conduct.

PETER OUTCALT
Attorney for the Defendant

Entry Overruling Motion to Quash

[Entered February 24, 1965]

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

CRIMINAL DIVISION

No. 85024

STATE OF OHIO,

Plaintiff,

v.

CLARENCE BRANDENBERG,

Defendant.

This matter came on to be heard on the motion of the defendant, Clarence Brandenberg, to quash the indictment herein, the arguments of counsel, and the law, and the Court, being fully advised in the premises, finds said motion not to be well taken and hereby overrules the same to all of which the defendant excepts.

Motion for New Trial

[Filed December 8, 1966]

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

CRIMINAL DIVISION

No. 85024

STATE OF OHIO,

Plaintiff,

v.

CLARENCE BRANDENBURG,

Defendant.

Now comes Clarence Brandenburg, the defendant herein, and moves the Court for a new trial in this cause for the following reasons, to-wit:

1. Error of law in the Court's failure to sustain the Motion to quash the indictment.
2. Error of the Court in its failure to sustain defendant's Motion for a change of venue.
3. Error of the Court in its failure to sustain the defendant's Motion to inspect tapes, films and documents.
4. Error of the Court in its failure to sustain the Motion to suppress evidence.

5. Error of the Court in its failure to sustain defendant's renewed Motion to suppress evidence made at the start of the trial.
6. Error of the Court during the trial in admitting into evidence certain items obtained in the search of defendant's premises.
7. Error of the Court in its failure to sustain defendant's Motion for dismissal at the conclusion of the State's case in chief.
8. Error of the Court in its failure to sustain defendant's objections to the admissions of other testimony and exhibits.
9. Error of the Court in sustaining certain objections of the Prosecuting Attorney.
10. The verdict of the jury was manifestly against the weight of the evidence.
11. Other errors apparent on the face of the record herein.

Respectfully submitted

PETER OUTCALT
Attorney for Defendant,
Clarence Brandenburg

Copy received:

Melvin Rueger
Prosecuting Attorney

By: (illegible)
Assistant

—2—

Reporter's Transcript of Proceedings

HAROLD ALAN LEONARD being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Nikolin:

Q. Sir, would you state your full name, please, and spell your last name? A. It's Harold Alan Leonard. L e o n a r d.

Q. And where do you live, sir? A. 6741 Maple Street in Mariemont.

Q. And, Mr. Leonard, directing your attention to—Well, let me ask you this. Where are you now employed, sir? A. WKRC-TV.

Q. What do you do there, sir? A. I am an announcer-reporter.

Q. And how long have you been engaged in that particular kind of work, sir? A. Oh, approximately ten years.

Q. Directing your attention to the 28th day of June of 1964, where were you employed at that time, sir? A. Crosley Broadcasting, now known as Avco Broadcasting, WLW.

Q. And for how long had you been employed by WLW-TV prior to June the 28th, 1964? A. Approximately two years.

Q. And, sir, directing your attention to several weeks

—3—

prior to that time, I'll ask you whether or not you had occasion to have a conversation on the telephone concerning a meeting which was to take place approximately on the 28th of June, '64?

Mr. Outcalt: Objection.

The Court: What is the objection?

Mr. Outcalt: Well, Number One, he hasn't identified the time. Number Two, he hasn't identified with whom. And, Number Three, it's a leading question.

The Court: All three objections will be overruled. You can't go into the conversation, but—

Mr. Nikolin: No, I am just asking him if he had a conversation.

A. Yes, sir, I did.

Q. And, did you take note of the voice with whom you spoke at that time, sir? A. I would have to answer that in this manner. Not at first, but after several conversations I did recognize the voice as being the same one.

Mr. Outcalt: Objection, and ask it be stricken as not responsive.

The Court: What was the question?

(Question read by the Reporter.)

The Court: Oh, it's generally, generally responsive. Overruled.

Q. Now, sir, can you tell these ladies and gentlemen on

—4—

how many occasions did you converse with the same voice, prior to the 28th of June, '64? A. Only generally. I couldn't give you any specific number, but there were—

Q. Your best estimate. A. There were several calls.

Q. And, as a result of those calls, Mr. Leonard, did you have occasion to go to 350 Two Mile Road on June the 28th, 1964?

Mr. Outcalt: Objection.
The Court: What is your objection?
Mr. Outcalt: Leading.
The Court: Overruled. Proceed.

A. I can't answer as to whether I went to 350 Two Mile Road; I did have an occasion to go to a house on Two Mile Road, but I do not know the number.

Q. All right, sir. Sir, the location that you went to, at 350—or at Two Mile Road on that date, June the 28th, was that location in Hamilton County, Ohio? A. Yes, sir.

Q. And, sir, what did you do when you got there—or tell us what occurred after you got to the general location of Two Mile Road on that day. A. We got to Two Mile Road—

Q. When you say "We" who do you mean, sir? A. My photographer, Gene Neuber, and myself were assigned to

—5—

this particular news coverage by Gene McPherson, the —now Vice-president of Avco in charge of news. We got to the area, turned down Two Mile Road, and got off of the paved section of it on to a dirt or gravel road, where we finally came up upon a car that was blocking the road. There were several hooded individuals carrying guns that stopped us at that point.

Q. What kind of guns, sir? A. Sir?

Q. What kind of guns? A. I recall at least one shotgun and one rifle, and I think there was another weapon. There were either three or four men. At least, I think they were men, because they had hoods on, they didn't look like women.

Q. What kind of hoods? Describe them. A. If I recall, they were—they appeared to be homemade, out of a sheet, with, you know, the holes in the eyes.

Q. All right, sir. A. They asked who we were, and then proceeded to lead us to a home at the very end of Two Mile Road.

Mr. Nikolin: Mark these.

(Two photographs were marked State's Exhibits 1 and 2 for identification.)

Q. Sir, let me show you this item marked 1 for identification, if you will. I'll ask you to look at that. See if you recognize that. A. Yes, sir.

—6—

Q. Sir, I'll ask you if that is a fair and accurate representation of what it portrays? A. Yes.

Q. And is that the same home that you say you saw when you arrived there or were led there? A. I believe it is, sir.

Q. Now, sir, did you have occasion then to notice the area of where you were? That is, the premises and surrounding grounds and so on and so forth? A. Yes.

Q. Let me show you this item marked 2 for identification and take a look at that, if you will, sir. Recognize that, do you, sir? A. Yes, I do.

Q. I will ask you whether or not that is a fair and accurate representation of that particular area as you saw it on the 28th of June? A. With one exception.

Q. Yes? A. There were numerous automobiles parked in an area in the background of this picture by what appears to be a dilapidated garage.

Q. I see. And did you notice anything else about that area, sir? A. Well, there were many things I noticed, but

—7—

what specific reference—

Q. I mean, did you have occasion to notice any kind of a structure such as a cross or anything of that sort? A. Yes.

Mr. Nikolin: Mark these 3 and 4.

(Two photographs were marked State's Exhibits 3 and 4 for identification.)

Q. Sir, let me show you an item marked for identification Number 3, and I'll ask you to look at that, sir. Recognize that, do you, sir? So far as the general area is concerned, is what we are interested in. A. I believe I do recall the post with the meter of some sort on it.

Q. Would that be a— A. This is the general type of area, yes.

Q. That would be a fair and accurate representation of that particular area?

Mr. Outcalt: Objection.

A. I would believe so, yes.

Q. Sir, let me show you Exhibit, or item marked 4 for identification, and ask you to look at that, if you will, sir. A. This is a close-up of the other one.

Q. Is that a fair and accurate representation of what it portrays? A. Yes, it is.

—8—

Q. All right. Now, sir, Mr. Leonard, would you tell these ladies and gentlemen what took place from that point forward? A. From the point of arrival?

Q. Yes. You say you were escorted to the house? A. Correct. We were met—there were several hooded indi-

viduals. If I remember correctly, there were twelve or thirteen of them.

Q. Were all these individuals wearing hoods, sir? A. Yes, they were.

Q. All right. A. And at all times. I never saw a face.

Q. All right. A. There was some discussion; I cannot recall it accurately. We then were allowed into the home, but refused admission to the back of the house where we were told there were women and we were not allowed back there. And, of course, made no attempt to do so.

There was a ceremony, if you can call it that, of a record playing by one of the reputed leaders of one of the Klan organizations. I don't know which one.

Q. Would you tell these ladies and gentlemen how you came to go to this location, Mr. Leonard? A. By these anonymous phone calls that I had received, telling me that there was going to be a news story, and that if I

would not call the police or notify the FBI, that we would be given exclusive, an exclusive news story.

Q. Well, sir, was this the same voice that you had spoken to prior to the 28th of June? A. Yes, it was.

Q. And, had you spoken to the same voice after the 6th of August of 1964? A. Yes.

Q. Had you spoken to the same voice on any occasion between the 28th of June and the 6th of August? A. Yes, sir.

Q. And, sir, did you eventually have occasion to learn the identity of that voice?

Mr. Outcalt: I will object, your Honor.

The Court: Yes. I think he can ask him whether or not he recognized the voice.

A. I recognized the voice.

Q. All right. And, did you have occasion at any time to come face to face with the individual who had that voice?

Mr. Outcalt: I will object.

The Court: What is your objection?

Mr. Outcalt: Well, your Honor, he is talking about an, anonymous phone calls and everything like that. I don't know if this man is an expert on speech or anything like that.

—10—

The Court: He said he recognized the voice. Now, of course, he has the right to ask him as to how he recognized that voice, whether he was acquainted with the voice, whether he ever talked to the individual with that voice. It is, of course, subject to your cross-examination.

Q. Can you answer that, sir? A. Would you please repeat the question?

(Question read by the Reporter.)

A. I believe I have, yes.

Q. And do you recall when that was, sir? A. I don't recall the exact date. It was some time after this person had been arrested.

Q. Now, sir, let me ask you to take a look at this defendant here, Clarence Brandenburg. Do you recognize him, sir? A. Yes, I do.

Q. And when did you first have occasion to meet him, sir? A. I believe it was after Mr. Brandenburg had been arrested.

Q. And, did you recognize his voice at that time, sir? A. At that time I think I would have to give a qualified, I am not sure.

Q. When did you first have occasion to recognize his voice? A. During subsequent numerous phone calls to my place of business, and my home, and when it got to the

point when I would get the phone call and immediately recognize it and say, "Hello, Clarence."

Q. Was that this defendant's voice, sir? A. Yes, it was.

Mr. Outcalt: Objection.

The Court: Yes. It's leading. You can ask him whose voice it was.

Q. All right, whose voice was it?

Mr. Outcalt: I will object to that, too. He said the only time he came face to face with this particular defendant he didn't recognize the voice from that. Subsequent telephone calls could have been with anybody, your Honor.

Mr. Nikolin: That is what we are asking him.

The Court: I don't think he said he didn't. He had a qualified— What was your answer to the— what was his answer to that question before when he said he had to qualify his answer? With reference to the recognition of the voice.

(Answer read by the Reporter.)

The Court: All right, your objection will be overruled.

Q. On how many occasions did you meet this defendant face to face, sir? A. The exact number I couldn't recall, but—

—12—

Q. Approximately. A. Numerous occasions, I would have to say.

Q. Did you recognize his voice at that time, sir, when you were face to face with him? A. Yes.

Q. And I'll ask you, sir, whether or not that was the voice that you first heard of several weeks prior to June the 28th, 1964, on the telephone? A. Again I would have to say, I would have to qualify my answer by saying I believe so. Because I did not pay that much attention to the voice prior to going to the meeting.

Q. Now, sir, let me ask you this question. On June the 28th of 1964, did you have occasion to come into contact with that voice again on Two Mile Road?

Mr. Outcalt: Object. It's leading.
The Court: Overruled.

A. Again I'll have to give a qualified answer, and that is that at the time with shotguns and rifles around you, I was a little bit too nervous to pay too much attention to any voices.

Q. What were you nervous about, sir? A. If you had a—if you were greeted with a shotgun and a rifle pointed at you or in the general direction of you, that would make you nervous, would it not?

Mr. Outcalt: Objection.

Q. Did it, sir, make you nervous? A. Yes, it did.

—13—

Mr. Nikolin: Mark this.

(A movie film was marked State's Exhibit 5 for identification.)

Q. Did you have occasion to photograph the activities— A. I did.

Q. —of the actions that took place? A. I did.

Q. While you were at Two Mile Road? A. I did. I had occasion to take part in photographing the activities.

Q. Were you present when the movie film was made? A. Yes, I was.

Q. At all times, sir? A. At all times. I shot part of it.

Q. Sir, let me show you this item marked 5 for identification. A. Yes, sir.

Q. Do you recognize that, sir? Is that the movie film that was shot at that time? A. I couldn't tell you unless I saw it, sir.

Q. Let me ask you, Mr. Leonard: Did you have occasion to view the film which was taken— A. Yes.

Q. —in your presence and partially by you? A. Yes, and put it on the air.

—14—

Mr. Nikolin: All right. Your Honor, in order to be able to ask the further questions which are necessary, we would like to project this film at this time for this witness' viewing.

The Court: Very well.

Mr. Outcalt: I will have to object to this being projected at this time, your Honor.

The Court: Well, it will be admitted on a professional statement that there will be a connection between this film and the defendant.

Mr. Nikolin: There will be that, your Honor.

The Court: Very well.

Mr. Nikolin: We would like at this point to introduce it into evidence.

The Court: You, of course, first have to see whether or not—what the witness will have to say about the film. I don't know if this is the film or not, or if there is any connection between the film and the defendant. I am taking your professional word there will be a tie-up between the film and the defendant.

Mr. Nikolin: Yes.

The Court: All right, proceed.

(State's Exhibit 5 for identification, a movie film with sound, was shown. Transcription as follows:

—15—

"I would like to—how far is the nigger going to—yeah. Over there. This is what we are going to do to the niggers. I would like to ask—call this—Patrick. A dirty nigger. Send the Jews back to Israel. I'm for it. Let's give them back to the dark—garden. Save America. Let's go back to constitutional betterment. Bury the niggers. We intend to do our part. Give us our state rights. Freedom for the whites. Nigger will have to fight for every inch he gets from now on.

This is an organizers meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus,

Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, caucasian race, it's possible that there might have to be some revengeance taken.

We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups—one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

Q. Mr. Leonard, do you now recognize this item marked 5 for identification? A. Yes, I do.

Q. Is that the film that was taken at that time? A. It

—16—

is a part of it.

Q. And, let me ask you, sir, at the time that the film was taken during your visit there, were there two sections, one in the house and one outside? A. Yes, there were.

Q. And, sir, the voice inside of the house at the time that the film was taken, the individual who was doing the speaking, do you recall how he was dressed? How was he dressed so far as the— A. The only one, the only thing I would recall that was distinctive would be, if I recall, a red hood as opposed to the rest wearing the white hood.

Mr. Nikolin: Mark this.

(A red cloth was marked State's Exhibit 6 for identification.)

Q. Sir, let me ask you to look at this item marked for identification No. 6. Recognize that, do you, sir? A. It is similar. I can't say it's the same one, but it is similar.

Q. Similar to the one you saw? A. Yes.

Q. And did you recognize— Let me ask you this. Did you recognize the voice that was doing the speaking inside of the house at the time you were making the movie? A. Not at the time.

—17—

Q. Not at the time. Do you now recognize the voice on this sound film that you just heard?

Mr. Outcalt: Objection.

The Court: You mean this morning here?

Mr. Nikolin: Just now, your Honor.

The Court: Overruled.

A. I would have to say yes.

Q. And whose voice is that, sir? A. I would believe it to be that of Mr. Brandenburg. However—

Q. Is that the defendant in this case? A. It is.

Mr. Outcalt: Objection. You interrupted him. He said, I believe it to be Mr. Brandenburg. However— Would you please let him finish.

Q. Go ahead. A. However, as I say, I am not an expert as such on voices. There are electronic means of doing this, however.

Q. Mr. Leonard, what did you do after you had completed the film at this particular occasion? A. Got out of there in a hurry.

Q. And what, if anything, was done with the film? A. The film was, of course, in its raw state and was taken

back to WLW, processed—that is, developed—put together, not in the order that it was shown this morning. There were

—18—

several other pieces that are not here this morning, that were used on the 11:00 o'clock show that evening, and again on the 6:00 o'clock show the following day.

Q. What show is that, sir? A. WLW-TV 5's newscast.

Q. And, at 11:00 o'clock p.m. on the 28th of June, 1964? A. Yes, sir.

Q. And, sir, would you tell us when did you next have occasion to come into contact with this same voice, after that particular time? A. Very shortly thereafter. I quite frankly can't recall because of the large number of phone calls that flooded the station that night, whether it was that night or the next day or so, but it was quite soon after the film was shown.

Q. Sir, I will ask you whether or not you had occasion to be at a location known as 618 Mill Street in Arlington Heights at a TV Repair Shop? A. No, sir, I did not.

Q. Never have been there? A. No, sir.

Q. And, sir, let me ask you if you had occasion to notice this defendant's right wrist when you came into contact with him personally. Do you recall that, sir? A. No, sir, I did not.

Q. The portrayal of the scenes which are incorporated

—19—

within this item marked 5 for identification, the sound movie film, are they fair and accurate representations of what took place at that time? A. Yes, with, as I say, there are several things missing.

Q. Yes, but what is there is a fair and accurate representation, is that correct, sir? A. This is correct.

Mr. Nikolin: If your Honor please, we would like to introduce into evidence at this point the item marked 5 for identification.

Mr. Outcalt: I will object, your Honor.

The Court: All right, step up here, counsel.

(Discussion out of the hearing of the Reporter.)

The Court: A short recess, ladies and gentlemen. Short recess.

(Recess taken. Discussion between Court and counsel during the recess out of the presence of the jury.)

(Jury returned from recess.)

The Court: All right, you may proceed.

Mr. Outcalt: Your Honor, do I understand my objection to admitting this into evidence—

The Court: I will reserve my ruling on it.

Mr. Outcalt: Okay.

Mr. Nikolin: Mark this.

(A movie film was marked State's Exhibit 7 for identification.)

—20—

Q. Mr. Leonard, you say that Exhibit 5, the— A. You are referring to the film that we saw?

Q. Yes. The original. Where is that original at? A. Here it is up here.

Q. This item marked for identification 5, you say is the original and that does not encompass everything that took place at the time you photographed it, is that correct, sir? A. I did not say this was the original, no. I said this is part of what was shown but had been chopped up.

Q. Now let me ask you, why was it chopped up? A. For several reasons. One, that NBC wanted part of the film,

we had to ship some of that to them. After they showed it, it was returned, spliced back in, it was changed around in position for re-showing the following day so it wasn't exactly the same thing that the viewers had saw before, and then there are parts missing that Mr. McPherson for one reason or another took out for promotion uses and so forth.

Q. Is there anything incorporated within item marked 5 for identification which was not taken in your presence? A. No, sir, that was all taken in my presence.

Q. All right. Now, sir, let me ask you: Do you know if any copies were made of that film? A. I know that copies were ordered to be made, yes.

Q. Sir, let me show you an item marked for identification Number 7. A. Yes, sir.

Q. And ask you if you have just viewed that film? A. Yes, I have.

Q. And is it a fair and accurate representation of what you photographed on the 28th of June? A. Yes, sir.

Q. At Two Mile Road. And does it have some parts which are not in the original? A. Yes, it does.

Q. Or item Number 5? A. That's correct.

Mr. Nikolin: Your Honor, I would at this time like to introduce into evidence items 5 for identification, and item 6 for identification.

Mr. Outcalt: Objection.

The Court: Of what?

Mr. Nikolin: Or 7, I'm sorry. 7. The copy.

The Court: Of what?

Mr. Nikolin: Of item 5. It has some things that item 5 does not have in it. Taken by this individual.

The Court: Are you showing anything else?

Mr. Nikolin: After it has been introduced into evidence I would then like it shown to the jury, your Honor, so they can have the benefit of that, also.

The Court: I think you better show it first, to

—22—

determine whether or not it's material to the issue in this case.

Mr. Nikolin: All right. Fine.

The Court: Then the Court will rule on it.

Mr. Nikolin: Fine.

The Court: As I understand it now, this picture here that you are running, together with the first picture you ran, is a complete picture of everything that took place on that day?

Mr. Nikolin: That may not be true, your Honor, but this item 7 will have some parts which are not included within 5.

The Court: Which were taken on that day?

The Witness: Yes.

Mr. Nikolin: Same date, time and place.

Mr. Outcalt: Your Honor, I don't see how we can receive a copy of the original into evidence.

The Court: If he testifies that—

Mr. Outcalt: It was not made in his presence; he said it was ordered.

The Court: When he sees it, he was there, if he can testify that it's an accurate picture of what took place, he can testify.

Mr. Outcalt: I object.

The Court: If he will so testify. I don't know what

—23—

he will testify to. That is up to the prosecutor to

ask him questions. If he doesn't, you make your motion to, to take it from the consideration of the jury.

(State's Exhibit 7 for identification, a movie film with sound, was shown. Transcription as follows:

"This is an organizers meeting. We have hundreds of members throughout the State of Ohio. I have a clipping here in front of me which is taken from a Columbus, Ohio newspaper five weeks ago, stating that we have more KKK members in the State of Ohio than does any other organization. We are making a march on Congress, four hundred thousand strong, on July the Fourth. From there we are spreading into two groups, one to march into Mississippi and the other into St. Augustine, Florida. I can quote—personally, I believe the nigger should be returned to Africa, the Jew returned to Israel. Thank you."

Mr. Nikolin: Now, your ~~Honor~~, I think the Court is going to have to admonish this defendant for making a demonstration in the presence of this jury.

The Court: What was that, Mr. Prosecutor? I didn't hear what you said?

Mr. Nikolin: I say, your Honor, I am suggesting to the Court that the defendant be admonished for making a demonstration in front of the jury.

—24—

The Court: Have your client, Mr. Outcalt, observe the ordinary courtesies of the courtroom. All right, proceed.

Mr. Outcalt: Excuse us, your Honor.

(Continuation of State's Exhibit 7 for identification. Transcription as follows:

"This is what we are going to do to the niggers. I would like to ask—call this—Patrick. A dirty nigger. Send the Jews back to Israel. I'm for it. Let's give them back to the dark—garden. Save America. Let's go back to constitutional betterment. Bury the niggers. We intend to do our part. Give us our state rights. Freedom for the whites. Nigger will have to fight for every inch he gets from now on."

Q. Sir, directing your attention to item 7 for identification, do you now recognize that item, sir? A. Yes, sir.

Q. Taken in your presence and partially by you on the 28th of June, 1964, is that correct, sir? A. That's correct.

Q. And is that a fair and accurate representation of what was taken, either by you or in your presence at that location on that date? A. Yes, it is.

Q. Sir, the voice which you heard within the dwelling,

in the house, do you now recognize that voice, sir? A. Again, I would have to say yes, but I did not recognize it at the time.

Q. Do you now recognize it? A. I would say yes.

Q. And is that the voice of the defendant Brandenburg? A. Again, as I answered before, I would have to say yes, but I'm not an expert.

Q. All right. Now, the voice which you say within the house you recognize now to be the defendant Brandenburg, can you tell us, sir, what color hood that particular individual was wearing? A. On that date?

Q. Yes. A. That would be a red hood.

Q. Would it be similar to item marked for identification Number 6? A. Yes, sir, I believe I have answered that already.

Mr. Nikolin: Your Honor, at this point we would like to introduce into evidence, commencing in chronological orders, item 1, 2, 3, 4, 5, 6 and 7.

The Court: Very well.

Mr. Outcalt: May I be heard?

The Court: Yes, sure.

Mr. Outcalt: Items 1 through 4, the defendant has

no objection whatsoever to those, your Honor. 5 and 7, I do object to the admission of those films into evidence because of the fact that, as I say, they have been edited, chopped up, the witness himself says they are incomplete; 7 is a copy, which has been apparently mutilated by the network to some extent; as to item 6, I don't think that there was any identification by the witness except he said this is one that looked like the one I saw out there on Two Mile Road.

So, I would object to 5, 6 and 7.

The Court: Objection will be overruled.

Mr. Outcalt: Note my exception.

(State's Exhibits 1 through 7 for identification were received into evidence and marked State's Exhibits 1 through 7.)

Mr. Nikolin: You may cross-examine.

Cross Examination by Mr. Outcalt:

Q. Mr. Leonard, you are now employed by WKRC-TV, Channel 12, is that correct? A. That's correct.

Q. And you said that—when did you go with Channel 12? When did you go to work for them? A. To be exact, I can't give you the day, but it was the day of the Ku Klux Klan rally across the river.

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They hired me that day to cover that meeting. I believe it was in either September or October of last—well, it would be '64. Or '65. I forget which. I really am not certain on the date.

Q. You can't recall if it was '64 or '65? A. I would have to try and refresh my memory. Well, I have been there a year and a half, so whatever date it goes back.

Q. That would be— A. Now you figure it out.

Q. Well, let's see. This is 11-66, that would be, a year and a half would be about March or April of '65. A. Well, it would have been '65 then. It would have been September of '65.

Q. That was approximately over a year after the— A. That is correct.

Q. —meeting you attended. Now, before you were employed to cover this Ku Klux Klan meeting across the river by Channel 12, how long had you been gone from WLW-T? A. Oh, about three months, if I recall, sir.

Q. And then you would have left WLW-T just about the end of 1964? A. No, it would have been in '65.

Q. The end of 1965? A. No. As I say, I was employed

—28—

by WKRC around September of '65, and I left 'LW, I believe it was, in June of '65.

Q. June of '65. That would have been approximately one year after the meeting on Two Mile Road? A. That is about right, yes.

Q. Now, sir, how long prior to that were you employed by WLW-T? A. Approximately two and a half years. A little bit short of three years.

Q. Where did you work before that, sir? A. WCKY.

Q. This is your second time with— A. No, WCKY Radio.

Q. I get WKRC and WCKY confused. You were in the radio business with WCKY? A. That's correct.

Q. About how long? A. I was there for two years.

Q. And this meeting that you attended on July—pardon me—June 28th, 1964, I presume that you had previously had some—you said you had previously had some conversation about that meeting with an individual over the telephone? A. That is correct.

Q. And, did you then report these conversations to Gene

McPherson, your boss? A. I did, sir.

Q. And was it Mr. McPherson who assigned you and Mr. Neuber to cover the meeting? A. That is correct, sir.

Q. And on these Exhibits 3 and 4, if you will look at them a moment, sir— We'll take Exhibit 3 here which is a, I guess you would call it a long shot of a couple of poles. Do you believe that is a picture that was taken at 350 Two Mile Road? A. I believe it is, yes, sir.

Q. And— A. If you want my reasons I can tell you why.

Q. Yes, if you would. A. Specifically, this is a concrete block where a cross had been, there is a pole with a utility meter of some type on it, and the other pole in the background.

Q. And, this is a close-up of that same— A. Same picture.

Q. Obviously? A. Yes, sir.

Q. When were these, 1, 2, 3, 4 taken, sir? A. I would have no idea, sir.

Q. Were you there when they were taken? A. I was not.

Q. Do you know if they were taken by your employer at

—30—

the time, WLW-T, or the Cincinnati Police Department? A. All I could give you is hearsay, sir. I understand that the Cincinnati Police Department took the pictures.

Q. When you went out on June 28th, 1964, to number 350 Two Mile Road, what time of the day or night was that that you got there, sir? A. It was late afternoon.

Q. And, well, what would you say, 4:00 o'clock, 5:00 o'clock? A. To the best of my recollection, it would be in that time period, yes.

Q. Well, now, actually, it probably would have been more like 4:00 o'clock because— How long were you there? A. That, again, is difficult to recall, the exact time period that we were there. We were there for a considerable length of time. I would say at least two hours. Possibly more.

Q. What time did you get back down to the station? A. We didn't go directly back to the station. We hadn't eaten so we stopped at Gene's home, which was in the area—that is, Mr. Neuber—and had something to eat and called in to the station. And, I roughly estimate that at about 8:00 o'clock in the evening.

Q. When were the films developed, sir? A. That evening, shortly after our arrival at the station.

Q. Now, during the entire time of approximately two

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hours that you were at number 350 Two Mile Road, were

there any other individuals present besides you and Gene Neuber who weren't covered by some sort of a hood or bedsheet or something? Other than you and Gene Neuber? A. That I saw?

Q. Yes. A. Not that I saw.

Q. Everybody you saw on Two Mile Road that afternoon had a hood or disguise of some sort on? A. This is correct.

Q. You could not recognize anybody by facial, facial features or physical make-up, or anything like that? A. No, that would be impossible, sir.

Q. Now, you say that the phone calls that you received prior to going out there and the voice that you heard at the inside portion of the meeting, you say that at that time you could not positively identify the man who spoke in the house with the voice you heard on the telephone? A. No, not at that time.

Q. Subsequent events have led you to believe that it might be Mr. Brandenburg? A. Both phone and personal conversations, yes.

Q. But, I believe you said, that you do not possess the necessary expertise to testify to this as a positive fact? A. No, only by the numerous phone calls.

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Q. Did you ever meet a fellow by the name of Jack Mink? A. What was the last name again?

Q. Mink. M I N K? A. I may or may not have, I meet so many people in my business every day that it's impossible to keep track of every single one.

Q. And you wouldn't know whether Jack Mink could imitate Mr. Brandenburg's voice or not?

Mr. Nikolin: There is an objection. Just a minute. There is an objection to that question, your

Honor. He is asking him, this witness, for a conclusion.

The Court: He said he doesn't know, he met so many people he wouldn't be able to recognize him.

Q. Now, you say that the shotguns and rifles that were out there at this place that day made you, I believe you said, nervous? A. Yes, sir.

Q. You said that they were pointed at you, is that correct? A. In the same general direction.

Q. I'll ask you, sir, did anybody make any threat with any of those weapons to you or Mr. Neuber? A. Not specifically. The threat was implied, let me put it that way. My interpretation was, just don't do anything out of the way, those things may be loaded, and I wasn't going

to ask.

Q. And you didn't do anything that you would consider out of the way? A. No.

Q. Exhibit Number— Well, let me back up a minute here, Mr. Leonard. I would like to ask you about the sequence in which these films were made. In other words, where was the first film taken that day, when you and Mr. Neuber—I don't care whether you took it or Mr. Neuber—where was it made? A. This is going to be difficult to answer. If I may, you noticed there were differences on the films. There was more than one take of each scene. If you noticed, the first film had some things in it that the second film did not. In other words, we re-took the scenes at least twice.

The best of my recollection is that the light was getting poor for shooting film and we shot the outside first, out of sequence of which a normal meeting of this type of

which I am familiar would be, and then went inside to the house because we could use our artificial lighting there and film that. That is my recollection. It may not be correct.

Q. Well, the first place you went was inside the house, I believe? A. The first place we went was inside the house, after we had a discussion outside of the home.

Q. And, I believe, at that time you said that there were

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some individuals meeting in another room and you weren't invited back there? A. We were specifically told we were not allowed back there.

Q. And, then these individuals came out? Did they come out from that room? A. No, sir. No, there were—the voices we heard in the back room were women. At no time did we see any women. And these other individuals did not come from the back room, they were on the premises.

Q. Now, to the best of your recollection then, you went outside to make your takes outside and then went inside? A. I believe so. I may be wrong in that. I may be wrong in the sequence, but I think the light was getting poor for shooting because of the trees and the wooded area and we had to get that first.

Q. After— Well, the first time this film was run was 11:00 p.m. on the 28th of June on the television, correct? A. That is correct.

Q. How soon after that were you contacted by the Cincinnati Police? A. I was contacted before it ran.

Q. When? A. We put what we call a promo on the air that we had an exclusive film of a Ku Klux Klan

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Meeting in Cincinnati. I was contacted by my competition

within two minutes asking me to give them the information so they could use it, which I refused.

Q. Who do you mean by your competition? A. Bill Gill at the time.

Q. Bill Gill was on 12 at the time? A. Yes, where I am now employed. Within a few moments a Cincinnati Police Officer arrived at the station wanting to know what went on.

Q. Who was the Cincinnati Police Officer? A. To my recollection it was Sergeant, now Lieutenant, Lind.

Q. Leicht? A. No, not Leicht.

Q. Lind? A. I think Lieutenant Lind was there. He may have been accompanied by Leicht. I believe there were two officers.

Q. Lieutenant Lind is presently with the Crime Bureau? A. Yeah, that is correct, sir.

Q. That is the same man, and he contacted you within a few minutes after the— A. The reason he contacted me is when I refused to give the information to Bill Gill, Mr. Gill then called the Police Department wanting to know if they knew anything about a Ku Klux Klan Meeting, told them he had heard it on our station, and that was what prompted the police to come to see us.

Q. Did Lieutenant Lind ask you where the meeting was? A. He did.

Q. Did you tell him? A. I did not.

Q. Did he ask at any time subsequent to that where it was? A. I can't recall whether it was Lieutenant Lind, but there were a number of police and FBI officers that asked me. And I did not at any time give them the information. That was part of the deal made on the telephone, that I would not reveal where it had taken place.

Q. Now, the film that you have seen exhibited here this morning, both number 5 and number 7, would you say that either one of them is a complete composition of all the film that was taken on June 28th? A. Not complete, no, sir.

Q. Is it true that neither one of them individually is complete? A. That is correct.

Q. Collectively would they even be complete? A. No.

Q. There are parts of those films that have been removed and you don't know their whereabouts? A. That is correct.

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Q. Who cut them up? A. I couldn't give you the individual but it would be the News Department of WLW.

Q. Did Gene McPherson ever do anything with these films? A. Well, he would have been the one that would have had to be responsible for it. He was the News Director at the time.

Q. Do you know specifically if Gene McPherson took out parts of that film that have never been returned to the station or to the police? A. I couldn't answer that specifically, sir.

Q. I will call your attention to a point in the film which shows up in different places in 5 and 7, when individuals are walking away from the cross, there is the word "Patrick" yelled out. Did you hear that? A. Yes.

Q. All right. What is that about? A. The best of my recollection, it was something having to do with patriotism and Patrick Henry.

Q. It was at least a full sentence, is that right? A. To the best of my recollection it was, yes.

Q. Was that in your original film? A. I would have to say I don't really know. The full statement would have

had to have been in the film, but whether we used it that way, I don't know.

Q. I don't mean if you used it or not, but whether it was in the film that you brought back to Channel 5? A.

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Whatever the statement was, was on that film, yes.

Q. You say this film besides being used at 11:00 p.m. on the 28th was used at 6:00 p.m. on the 29th, is that correct? A. To the best of my knowledge, yes.

Q. And in addition to the voices on the film, I presume there were commentary by a member of the staff? A. By myself and Mr. Neuber that night, of the 28th, and I am not sure—again, I believe again at 6:00 the following day.

Q. Now, this copy that was made was shipped where? A. Well, now, I don't know if this copy was made and shipped anywhere. I know a part of it, of the film, was shipped to NBC in New York for their use.

Q. Now, when you ship a film—you have been in this television business for a long time—now, when you ship a film to the network, do they return it to you?

Mr. Nikolin: Objection. Wait a minute. Objection. He might ask in this particular case what they did, if he knows, but I don't want any generalities, and I don't think this is accepted—

The Court: I don't see any harm to know the general procedure that was taken. He may answer.

A. May I have that question again, please?

(Question read by the Reporter.)

A. When we request it.

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Q. Do you know if you requested this returned?

Mr. Nikolin: Objection, your Honor. Now, that is clearly wrong.

The Court: If he knows he may answer.

A. Yes, we did request the film be returned.

Q. When did you get it baek? A. I can't answer that.

Q. Do you happen to know if this film was subsequently shipped to Neil Wetterman, W E T T E R M A N, in New York? A. No, that would be a question Mr. McPherson would have to answer.

Q. Do you happen to know if Mr. McPherson is under subpoena to come in to this courtroom?

Mr. Nikolin: Objection. Wait a minute. Objection.

The Court: Sustained.

Mr. Outcalt: One moment, please, your Honor.

Q. Oh, Mr. Leonard, this red hood. You, I believe, in your testimony described this thing as similar to a red hood that you saw on the 28th of June, 1964? A. I would just say similar, yes.

Q. Is there anything that you would believe is different about this hood than there was about the one on the 28th?

Mr. Nikolin: Objection to his question.

The Court: He may answer.

Mr. Nikolin: He is phrasing it improperly.

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The Court: He has a right to cross-examine him.

A. The only thing I would have to say, and this is supposition, if you noticed on the film it was heavily stained with sweat. I don't see any sweat stains on the hood now, but that would be the only thing.

Q. Now, Mr. Leonard, in your films, that were shown here previously, the films that were made in the house, can you identify the person from whom those voices came as to how he was dressed that day? In other words, which, which particular individual in those films by description was that? Was it the man—can I ask it this way—was it the man with the red hood or wasn't it?

Mr. Nikolin: When, your Honor? This is what is troubling me. When is he talking about.

Q. I am talking about when the films were made inside of the house. I want to know whose voice was that on the film? A. When the films were made inside the house, I could not tell you whose voice it was, or who was behind the hood.

Q. Can you tell which hood it came from under? A. Oh, yes.

Q. All right. Which, please? A. Yes, the voice that was on our recording was from the gentleman, I believe, with the red hood. He was the only one that had the red hood.

Q. And those voices inside, you are, you say you believe

they came from under the red hood. Are you sure they came from under the red hood? A. I am absolutely certain they came from under the red hood.

Q. All right. That is what I was trying to get. A. Yes.

Q. Now, outside in these pictures, which have been rearranged in certain ways between the two films—I am not

talking about the part where there were, the wolf howling at the Lake Como Railroad in the background and that is all you can hear, I am not talking about that, but—well, calling your attention specifically, there was, in each copy of the film there was the sound of footsteps. Do you know where that sound came from? A. Yes, from me.

Q. How did that come about? A. The house sat up on a bluff or on a hill, and, of course, the ceremony was taking place and we were shooting at a downward angle. In order to pick up sound, I had to take the microphone and take it as far as our cord would reach, which was approximately a little ditch down at the end of the steps, and lay the microphone down there, and those were my footsteps carrying the microphone down.

Q. There was a man that coughed. Who was that? A. That was me, also.

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Q. All right. Now, sir, in these films, I believe that the, conclusion of the time that the pictures were shown of the cross burning, and at the time when the individuals were walking down across what was apparently a creek bed or something, there were some voices which said, this is what we are going to do to the niggers. There was a voice that said something, garbled, but it sounded like, Bury the niggers. There was something about sending Jews back to Israel, and other statements. You heard this tape, did you not? A. Yes, I did.

Q. Can you identify the hood from, from which any one of these remarks came? A. I don't think I follow your question quite, sir.

Q. Can you tell me the individual who made those remarks? A. Do you mean, name them?

Q. Just describe them. I mean, were they coming from the red hood or white hood or do you know? A. I could only do that by having the film put up again, and as he spoke say that is the person that said it, but I couldn't identify them.

Q. How could you tell who the person was that was saying it? A. By reason of the sound track, the placement of the microphone, et cetera. But I couldn't tell you who said it.

Q. These voices that you heard making those statements

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walking away from the cross, on the film, did any of them sound to you like the man who was under the red hood in the house?

Mr. Nikolin: There will be an objection to that, your Honor.

The Court: He may cross-examine him.

A. I don't know, sir.

Mr. Outcalt: No further cross-examination, your Honor.

Mr. Nikolin: Just one question, I think, Mr. Leonard. Concerning Exhibit 6, I believe—

Mr. Outcalt: That's 6.

Mr. Nikolin: I think it's 6, the hood.

The Witness: Yes, sir.

Mr. Nikolin: From the time that you last saw it on June 28th, '64 until now, do you know whether or not it's been laundered or cleaned?

The Witness: No, I have no idea, sir.

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PAUL W. ROTH, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Nikolin:

Q. Sir, would you state your full name, please? A. Paul W. Roth.

Q. And your present address, sir? A. 520 Olden Avenue, Arlington Heights.

Q. How are you now employed, sir? A. I am employed as a machinist at General Electric.

Q. And, how long have you been there, sir? A. Since the 24th of January, this year.

Q. Of this year. Prior to that, sir, what did you do? A. I was Chief of Police in the Village of Arlington Heights since 1959.

Q. Were you Chief of Police on the 28th day of June of 1964? A. Yes, I was.

Q. And, sir, did you have occasion at 11:00 p.m. on that night to view the television newscast given by Channel 5,

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WLW-TV, under Peter Grant's newscast? A. Yes, I did.

Q. And, sir, did you have occasion to observe anything at that time that you were familiar with, an individual whom you knew?

Mr. Outcalt: Objection.

The Court: What is your objection? What is your objection?

Mr. Outcalt: Well, he said did he see an individual he knew.

The Court: Well. I don't know whether it has any bearing or not, let's see what his answer is. Overruled.

A. I was watching the television program, news program come on, and I recognized a voice that I have heard from time to time over the past five years.

Q. Whose voice was that, sir? A. The voice of Clarence Brandenburg.

Q. That is the defendant here, sir? A. Yes, sir.

Q. And, would you tell these ladies and gentlemen what you saw that led you to believe that you recognized the voice of Clarence Brandenburg? A. Well, at the time—

Mr. Outcalt: Objection. How could somebody see something and recognize a voice?

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Mr. Nikolin: Well, see or hear, put it that way.

The Court: What he seen or heard? I don't know whether he saw or heard—

A. At the time while I watched this film which was on television, as I say, I recognized the voice of Clarence Brandenburg. The following day I went to the television repair store that Mr. Brandenburg owned in the village, and I stopped in to see him. And while watching this film I noticed the marks on the right wrist and the left wrist of Mr. Brandenburg, and also a wedding band. I went up there to see if this would be the same as I had seen on the film, and they were.

Q. And, for how long had you known him? I think, you said five years, did I hear? A. Approximately five years.

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PEARL R. HOLLIS, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Nikolin:

Q. Sir, would you state your full name and spell your last name, please? A. Pearl R. Hollis. Last name, H O L L I S.

Q. And you, sir, are a Captain of Police of the City of

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Reading? A.That's correct, sir.

Q. And, how long have you been with the Reading, Ohio Police Department? A. Twenty-one and a half years.

Q. And, you were so employed and ranked on the 28th day of June of 1964? A. Yes, sir.

Q. Now, sir, did you have occasion to see a newscast on WLW-TV, Channel 5, on the 28th of June of 1964 about 11:00 p.m.? A. Yes, I did.

Q. Now, sir, prior to that time, did you know this defendant, Clarence Brandenburg? A. Yes, sir.

Q. For how long had you known him, sir? A. I have known Mr. Brandenburg at least eight to ten years prior to that time.

Q. Prior to that time. Were you familiar and acquainted with his voice, sir? Talk to him many times? A. Oh, yes, I had talked to him many times on the phone and personally and so forth.

Q. Sir, did you have occasion to make any comparison or connection between the voice that you heard on the television? A. Yes, I did.

Mr. Outcalt: Now, I object, your Honor. He can

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ask who it is; he cannot lead his witness like this.

The Court: Yes, you are leading the witness.

Mr. Nikolin: I am not—

Mr. Outcalt: Oh, yes, you are.

Mr. Nikolin: I asked him if he recognized him.

The Court: Ask him what he heard on the film, and ask if he recognized any voice on the film he saw that night.

Q. Would you tell these ladies and gentlemen? A. When I saw this film on the news that night, I recognized the voice of Mr. Brandenburg. And—

Q. What did you see when you recognized the voice of the defendant?

Mr. Outcalt: I object. He interrupted him. He said "And", and then he interrupted him again, your Honor.

The Court: All right, proceed.

A. When I saw this newscast, it brought to my attention the voice. When I—I wasn't watching the television at the moment, but when I heard the voice I looked and saw the subject talking, and I recognized the voice as being Mr. Brandenburg, who was on a, was in a robe, had a robe over his head.

Q. Had a what, Chief? A. He had a robe over his head. And he had, his hand across his chest, and speaking into a microphone. And, as I say, I recognized the voice as being

that of Mr. Brandenburg. Also, the fact that on his wrist he had, as he always did wear in the many years that I had known him, a wristband, that—he had—I—as I say, I have known him for many years and he always wore this wristband.

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Further Direct Examination by Mr. Nikolin:

Q. Captain Hollis, you will recall yesterday that I had asked you to take a look at this item marked 6 for identification. Do you recognize that, sir? A. Yes, I do.

Q. And, where had you come into contact with that? A. This was found in Mr. Brandenburg's business establishment on a window shelf, built out, partition or board, from the window.

Q. In the TV shop? A. In the TV shop in Arlington.

Q. All right. And, sir, let me show you— And this was taken at the time of the arrest and search, I take it, is that correct, Captain Hollis? A. Yes.

Q. On the 6th of August. Take a look at number 9, if you will, sir, and number 10. Do you recognize those two

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items? A. Yes, sir.

Q. And, where were they found, sir? A. He was wearing these at the time of his arrest.

Q. Where was the wristband? On which wrist was he wearing that? A. The wristband was on his right wrist, and the watch was on his left wrist.

Q. Had you seen those items in his possession before that date, sir? A. Yes, he always wore these items as long as I had known him. For many years he had worn a wristband on his wrist.

Mr. Nikolin: Would you mark these as one item.

(Three books, papers, two rifles, a revolver, envelope with contents, and a Bible were marked State's Exhibits 13, 14, 15, 16, 17 and 18 for identification.)

Mr. Outcalt: Sorry, your Honor, I want to take a minute to look at these things, which I have never seen before.

Mr. Nikolin: Mark this.

(An envelope with contents was marked State's Exhibit 19 for identification.)

Mr. Outcalt: All right, your Honor, I have looked at the Exhibits.

Q. Captain Hollis, let me show you item marked for identification number 13, consisting of three pieces. Do you

recognize that, sir? A. Yes, these items were all taken from his establishment and TV shop in Arlington Heights.

Q. How about item 14, this stack of various papers? A. Yes, sir, these items were all taken at the same time from his establishment in Arlington Heights.

Q. All right. Now, how about this item marked for identification number 15, shotgun and rifle and case? Do you recognize those, Captain? A. Yes, sir, I do. These items likewise were taken.

Q. Pardon me? A. These items likewise were taken from his establishment.

Q. What was the condition of the shotgun and rifle so far as being loaded or unloaded at the time they would found? A. They were loaded—the shotgun was loaded. And they were unloaded by one of the Cincinnati men.

Q. In your presence, you mean? A. Yes.

Q. Were you in the place at the time? A. Yes.

Q. Now, would you take a look at 17, Captain? A. Yes, sir.

Mr. Outcalt: You went from 15 to 17.

Mr. Nikolin: Yes, for the moment.

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Q. Recognize those? A. Yes, this was the ammunition taken from the shotgun.

Q. Shotgun and rifle and revolver, is that correct? A. Revolver was likewise taken from his—

Q. Item marked 16 for identification, a revolver, find that there, Captain? A. That was found there. It was also loaded and it was unloaded by a Cincinnati officer.

Q. And, Captain Hollis, let me show you item for identification number 18.

Mr. Outcalt: 19, Mike?
Mr. Nikolin: 18.

A. This likewise was taken from his establishment. It was lying with these other items on the table or extended bench.

Q. Now, Captain Hollis, would you tell these ladies and gentlemen when you found these items in the store, were they covered or uncovered, do you recall that?

Mr. Outcalt: I object, it's entirely immaterial whether they were covered or uncovered, your Honor.

The Court: He can show the position these items were in at the time he found them. I assume they were found as a result of the search warrant, is that correct?

The Witness: Yes, sir.

The Court: Very well.

A. The items were covered with newspapers on this shelf, haphazardly covered.

—73—

Q. Newspapers covered them, is that correct? A. Yes.

Q. Now let me ask you to take a look at item 19 for iden-

tification. A. I might mention on the pistol, after we had found this shotgun and the rifle, we had asked Mr. Brandenburg if there were any more weapons in the establishment, and he verified that there was this pistol in a desk draw, and he showed us where it was and that's where we found the pistol, and the pistol, as I say, was loaded and one of the Cincinnati officers unloaded it.

Q. Now, Captain Hollis, would you take a look at item 19 for identification, sir; see if you recognize that. A. Yes, sir. Yes, I recognize these items, and they likewise were found in his establishment.

Q. Same time, in your presence, Captain? A. Same time and place.

Q. Now, Captain Hollis, let me for a moment ask you: You had occasion—or did you have occasion to view the film which is marked for identification number 7? A. Yes, I have viewed this film.

Q. And, sir, do you recognize the scene within that movie film within the building? A. Within the building where this conclave took place?

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Q. Yes. A. Do I recognize the scene within the building?

Q. Have you seen it before on that movie film? A. Yes.

Q. And do you recall hearing a voice making some statement or other? A. Yes, I do.

Q. And do you recognize the voice on that film, sir? A. Yes, sir, I do.

Q. Can you tell these ladies and gentlemen whose voice that is? A. That was Mr. Brandenburg's voice. Clarence Brandenburg.

Q. Is that the same scene that you had seen on the 28th of June at 11:00 p.m. on television, Channel 5?

Mr. Outcalt: I object. It's repetitious and leading.

Mr. Nikolin: Well, let me rephrase that.

Q. Had you heard and seen—heard the voice and seen the scene before? A. Yes.

Q. And where? A. On a news broadcast, I believe the date was about June the 28th.

Mr. Nikolin: Your Honor, at this time we would like to introduce into evidence these items which we have marked for identification. I think they are—

—75—

commencing with 13 through 19, your Honor, at this point.

The Court: These items were all seized where?

Mr. Nikolin: At the TV shop owned by this defendant in his presence.

The Court: Pursuant to the issue of the search warrant?

Mr. Nikolin: That's correct.

The Court: Were they all—I mean, is there some relation—

Mr. Nikolin: There is a direct relationship between each one.

The Court: I mean, all the paper items. I haven't seen them. Do they relate to this organization?

Mr. Nikolin: Yes, your Honor.

The Court: KKK?

Mr. Nikolin: So far as we are able to determine, and the documents speak for themselves. They are a part of that.

The Court: They will be admitted.

Mr. Outcalt: I object, your Honor, and I would like to be heard on it.

The Court: Very well.

Mr. Outcalt: In the first place, I would renew what I said previously about this being an illegal search warrant. In the second place, we have such things

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here as a Holy Bible. Now, I can't possibly see how you can admit into evidence a Holy Bible as being something that's seized in a search. I would hope that every—

The Court: Mr. Outcalt—

Mr. Outcalt: —man, woman and child in the United States has one.

The Court: The only thing, I can recall that pictures were exhibited, permitted to be exhibited by the Court. I can remember specifically there was a Holy Bible lying on the—wasn't it on a desk, sort of a desk—at the time Mr. Brandenburg's voice was heard—which certain statements were made.

I think it should all go to the jury or none go to the jury. That is all part of the picture there.

Mr. Outcalt: Well, we have another thing here that's among these Exhibits, and this apparently is a book of names and addresses. It says, "AMERICAN PEOPLE. NAAWP. BRANDENBURG." All right, it says that. But then it has got such things in here, your Honor, if the Court please, it's got "DAD 2/18/1888. MOM 3/27/1882." I presume these were the birth dates of this man's parents.

It has "Cincinnati Open Forum, Box Number 8952, Cincinnati, Ohio 45208."

The Court: Anything that relates to this particular organization, KKK organization, and was

—77—

found in the possession of the defendant Branden-

burg— However, it must relate to the organization which was pictured on this movie film. I don't have time now to go through every item, I think you two gentlemen can get together on that during a recess and take from these Exhibits you have offered those items which do not directly relate to this organization.

Mr. Outcalt: I submit this thing right here right now doesn't have one thing to do with it. It's an address book. Is it a crime to possess an address book?

Mr. Nikolin: If your Honor please, if I may be heard—

The Court: What is NAAWP?

Mr. Outcalt: It's National Association for the Advancement of White People. An organization that was run by a fellow by the name of Bill Miller.

Mr. Nikolin: Now, your Honor, if we are going to have this sort of thing, I think the jury should be excused at this point.

The Court: Oh, no, the jury can—anything that isn't evidence, ladies and gentlemen, you are to disregard.

Now, if this is not admitted into evidence, you are to disregard it totally, entirely from your consideration. Only things that the Court admits. Conversation between Court and counsel are not evidence.

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You are to disregard that, pay no attention to it.

Mr. Outcalt: Have these been admitted?

The Court: Unless there is some connection between the NAAWP and the KKK organization, I'm going to sustain the objection to this.

Mr. Nikolin: Well, I think possibly we can tie it up a little later, your Honor.

The Court: That is up to you—subject to being tied up. Anything else that doesn't relate to the KKK?

Mr. Outcalt: Here is a receipt book, your Honor. It doesn't have a thing to do with the KKK.

Mr. Nikolin: Now, I think, Mr. Outcalt knows better than that.

Mr. Outcalt: Mr. Outcalt doesn't know anything but Mr. Outcalt never saw those things until this morning, and you know it.

The Court: Well, unless there is some connection between this and the KKK, I will sustain the objection to anything where there is no connection between the Exhibit offered and the KKK. But if there is direct connection between them, I will admit it. All right, you can decide that later at noon, noon recess. Let's pass this by at this time.

And I am admitting them all, subject to those items being stricken that have no connection between the KKK—

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Mr. Outcalt: Here we have one Goldwater Rally. I hope that is not connected with the Klan. Note my exception to the admission of any of these.

The Court: I just got through telling you, it's admitted subject to your right to eliminate those items that are not connected with the KKK.

(Subject to the Court's ruling, State's Exhibits for identification were received into evidence.)

The Court: Ladies and gentlemen, there will be a short recess, however, you ladies and gentlemen can

sit right where you are. This has nothing to do with the case on trial. This is another matter that the Court had to render a quick decision on.

(Short recess taken.)

The Court: All right, proceed.

Further Direct Examination by Mr. Nikolin:

Q. Captain Hollis, directing your attention to a segment of the item marked for identification number 13, and directing your attention to a small item located therein, small book marked, "AMERICAN PEOPLE, BRANDENBURG, NAAWP," I think, did you have occasion to examine that document, Captain Hollis? A. Yes, we scanned these things as we picked them up in his place of business.

Q. Now, did you make any comparison with the writing

—80—

of names within that particular document with any other list contained in item marked for identification number 14? A. Yes.

Q. Did you find any duplication or any similarity or comparison?

Mr. Outcalt: I object, your Honor.

The Court: Yes, what is the purpose of this, Mr. Prosecutor?

Mr. Nikolin: Well, I think they said, your Honor, that there wasn't any connection, and we are trying to develop that now, your Honor, with this.

The Court: What is the other item—comparing it with?

Mr. Nikolin: Let me ask it this way.

Q. Did you find an item within number 14 there, as a list of Ku Klux Klan members?

Mr. Outcalt: I object, your Honor. It's a leading question.

The Court: Yes, that is leading.

Q. What kind of list did you find within item marked 14, Captain Hollis? A. We found lists indicating listing of other members of the Ku Klux Klan.

Q. Now, did you compare that list with the small book that you are holding in your hand, sir? A. Yes, sir. We

—81—

determined that names in this book here were also found in items of this group here.

Mr. Outcalt: Object.

The Court: Overruled.

Mr. Nikolin: You may cross-examine.

Cross Examination by Mr. Outcalt:

Q. Did Mr. Brandenburg have a telephone book out there at his place? A. I don't recall actually seeing the telephone book.

Q. If he did have a telephone book it would have names similar to some of those names in it, wouldn't it?

Mr. Nikolin: Objection.

The Court: Yes, unless he saw a telephone book. I imagine he wouldn't be able to answer the question. You didn't see any telephone book, as I understand it? Mr. Witness?

The Witness: Sir?

The Court: You didn't see any telephone book?

The Witness: No, I don't recall seeing a telephone book.

The Court: Very well.

Q. That one you have got right there in your hand, who are those—what's on those stubs that are so important?

Mr. Nikolin: Now, your Honor, I have to object to

—82—

his last few words there, that are so important.

The Court: Ask him; he can answer. Let him answer.

A. What I found in this book here was names that were also on the list of the Ku Klux Klan member list that were found in this group of papers here.

Q. Now, Captain, you have in front of you a pistol, a revolver or whatever you want to designate it. You say that was voluntarily produced by Mr. Brandenburg? A. Well—

Mr. Nikolin: Your Honor, he didn't say it was voluntarily. They asked him if there were any other weapons and he showed them where it was.

The Court: Mr. Prosecutor, he has a right to cross-examine. Proceed with your cross-examination.

A. Will you repeat the question, please?

Mr. Outcalt: Repeat it.

(Question read by the Reporter.)

A. I wouldn't say that it was voluntarily produced, I would say that we asked if there were any other weapons.

Had we not of asked that question, perhaps we would never have found the other weapon without a thorough, complete search.

Q. Is that particular weapon—did that show up anywhere on Channel 5's television program? A. I don't recall seeing it.

Mr. Outcalt: Your Honor, I would ask that that be

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withdrawn, that particular pistol. There is no law against having a pistol. He said he can't connect it with the movie or anything else.

Mr. Nikolin: Now, your Honor, of course, I say to you that his premise is wrong. Just because it may not have been in a movie wouldn't make it inadmissible. These were the items that were found.

The Court: Well, there is no testimony concerning any revolver held at the meeting— What was the name of the road?

Mr. Outcalt: Two Mile Road.

The Court: —on Two Mile Road in that house.

Mr. Nikolin: If you will recall the testimony of Mr. Leonard, he said that people were armed with shotguns, rifles, pistols, revolvers, that sort of thing.

The Court: Was there testimony to that effect? I don't recall it.

Mr. Outcalt: I think he said they were armed. Whether he said with pistols, I don't know. I can't make a definite statement.

The Court: Mr. Prosecutor, do you remember whether the pistol—

Mr. Nikolin: I can so say, and the record will so show.

The Court: You can renew your motion during the

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recess and we'll look it up and see if we can find it.

Q. Captain, there is a couple of guns here. A. Yes, sir.

Q. Do you know what type of guns these are, manufacturer's designation, anything about them? A. One is a shotgun, the other is a rifle. I looked at them at the time, I didn't scrutinize them to any detail.

Q. Do you know the make? A. No, sir.

Q. Have you ever seen guns like this any place else? A. Oh, yes, I have saw—

Q. What caliber is this particular weapon I have in my hand? A. That's a .22, sir.

Q. There is nothing particular about this gun that you would, could identify, is there? A. Just that the make, of the wood grain, and so forth, of the gun I recognize it as the gun that was taken at the time. I didn't mark the gun.

Q. Is this any unusual weapon, one of a kind, there's only been one manufactured like it, or anything like that?

Mr. Nikolin: Objection, your Honor. Calls for a conclusion on his part.

The Court: Oh, he may answer.

A. I would say no, there is nothing unusual, it's a .22 rifle.

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Q. What about the shotgun? What—I believe you call those gauge, don't you? What gauge is that? A. 20 gauge shotgun.

Q. Is this a particularly unusual weapon? A. No.

Q. What about the case; is there anything unusual about the case? A. The only thing unusual about the case was that that shotgun was in the case and it was loaded, which was unusual to store a shotgun in a case and have the

shotgun loaded, which we were very surprised to find at the time.

Q. These papers—I'll call your attention particularly to this thing, Goldwater Rally. Is this a particularly unusual document? A. I would say so, yes, sir.

Q. You can explain why. A. Well, inasmuch as it announces a meeting of a Goldwater Rally on August the 9th, that—at 5:00 p.m., and in it it states that members of the different right wing groups will take part including a cross burning by Ku Klux Klan, Klansmen in robes will sign up new members. White men attend across street from Valley TV, 618 Arling—Mill Street in Arlington Heights.

Q. Was there such a rally across—Goldwater Rally and

a cross burning in Arlington Heights? A. Not that I recall on this particular date. I think it was called off because of the arrest of Mr. Brandenburg on the 6th.

Q. Mr. Brandenburg got out on bond on the 6th, too, didn't he?

Mr. Nikolin: Objection, your Honor. Now, how would he know that?

The Court: What's the difference? They let him out on bond. He may answer.

A. I don't know whether Mr. Brandenburg was out on bond on the 6th or not.

Q. Well, you recall an incident that happened on the evening of the 6th in front of his TV shop, don't you? A. Yes, sir.

Q. Or was it the 7th? A. I recall the incident that happened. Whether or not it was that same date or not, I don't remember.

Q. And Mr. Hanna was out there with him, and you arrested Mr. Hanna? A. I did not know—

Mr. Nikolin: Wait a minute. Now, your Honor, there is an objection. There is no—

The Court: Objection will be overruled.

Mr. Nikolin: —connection of any kind.

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The Court: Objection sustained.

Q. Now, that blue book in front of you, that is a book about the Ku Klux Klan, is it not? A. Yes, sir.

Q. Did you, as a police officer, regard this as a crime to possess that book?

Mr. Nikolin: Objection, your Honor.

The Court: Objection will be sustained.

Q. How do you identify those bullets and shells as the same bullets and shells that you found in the weapons? A. Well, this ammunition was removed from the weapons and it was in the possession of the Cincinnati officers since that time.

Q. Did you mark it in any way? A. I did not mark it, no.

Q. So far as you know, you can't tell that those were the same exact bullets or ammunition, could you? A. No.

Q. The Bible that says it's a Gideons Bible, can you—is there any way you can identify that as being a particular Bible that you picked up on the night or afternoon of August the 6th? A. I know that it was a Gideons Bible, and that it was a Gideons Bible that was on display in the film.

Q. Now, you have previously seen this Exhibit number 12,

—88—

have you not? A. Yes, sir.

Q. And, I'll ask you if this doesn't say, "Affiant has seen Clarence Brandenburg enter the property—"

Mr. Nikolin: Now, your Honor, there is an objection before—and he has it all mishmashed, I don't know what he is doing. He is reading from something that is not in evidence. It has no relationship at this point.

Mr. Outcalt: It's marked for identification.

Mr. Nikolin: It's evidentiary wrong.

The Court: What is that?

Mr. Outcalt: A search warrant marked for identification.

The Court: You may read from it.

Q. "Affiant has seen Clarence Brandenburg enter the property, that he operates a business there, and affiant has information from reliable citizens who attended the place where the advocating of violence took place."

Is that the search warrant you went under? A. I did not sign this search warrant. Carl Leicht signed the search warrant, and this is the search warrant that we went in to serve the place with.

Q. Do you know who the reliable citizens mentioned in that are?

Mr. Nikolin: Objection, your Honor. That would

be a conclusion on his part.

The Court: I think the objection will be sustained.

Q. Did you ask who the reliable citizens were when you went in and searched these premises?

Mr. Nikolin: Your Honor, now, I don't know what we are doing. Certainly, he has no duty to ask anybody else, he is armed with a search warrant, issued by proper authority. Now, he doesn't have to ask

anybody; whether or not he did wouldn't make any difference.

The Court: I don't think this Court will feel it's necessary to disclose who the people were who gave them, gave the officers information, especially in a case where the officer himself previously testified he saw these things, certain things going on, as a result of a motion picture that was exhibited on the night of June the 28th, publicly displayed to all of the public on a TV program. He himself saw that. Together with additional information he seemingly obtained elsewhere. I don't think it's necessary to tell the people who gave them the information. Objection sustained.

Q. Now, this address book that was an Exhibit. There is the name of Bill Flax in there. Do you know who Bill Flax is? A. No, I don't know Bill Flax.

Q. Is Bill— You don't know whether Bill Flax is an attorney practicing in Cincinnati or not?

—90—

Mr. Nikolin: Your Honor, he already said he didn't know who Bill Flax was. Now, why go through this? He knows better than this. I am objecting to that.

Q. Is Bill Flax's name on any of those other lists? A. I don't recall whether his name is on the other list or not. I would have to see the list.

Q. Is Cincinnati Open Forum on those other lists? A. I don't recall it being on the other list.

Q. Are Dad and Mom on those other lists? A. Not that I recall.

Q. There is no entry on the other list, "DAD 2/18/1888,

MOM 3/27/1882?" Those aren't anywhere else, are they? A. Not that I know of.

Q. Do you recall if there are doctors' names in this list? A. Not designated as doctors. I don't know whether it names doctors or not.

Q. What about— A. I would have to have the other list in comparison. Might I explain? That in going through that book there, names came up that would be in connection with furthering the investigation of this Ku Klux Klan activities. That is why we connected that with these other items, and that is why it is a part of the whole basic issue here.

Q. Card number Credit Bureau 9418, is that of any par-

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ticular significance to you? A. No, sir.

Q. There are certain newspaper clippings in there, too, is that correct? A. Am I what?

Q. Newspaper clippings in there? A. Yes.

Mr. Outcalt: That's all.

Mr. Nikolin: Thank you, Captain.

(Witness left the stand.)

Mr. Nikolin: Mark these.

(Two photographs were marked State's Exhibits 20 and 21 for identification.)

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(Deposition of JAMES R. VENABLE, Esq., Member, Knights of the Ku Klux Klan; Imperial Wizard or President, National Knights of the Ku Klux Klan of America; Temporary Chairman of the National Knights of Ku Klux Klan Association of America.)

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Q. And, would you tell, sir, the Court and Jury in this case for which your deposition is being taken, what are the basic purposes, objectives of the Ku Klux Klan?"

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Mr. Nikolin: Objection.
The Court: Overruled.

By Mr. Outcalt:

"A. Well, as I stated before, it is a secret fraternal patriotic organization. The Klan of 1915, our purpose was to try to unite christian white people together to use at the ballot box to vote for peopole who were conservatives, people who they felt would make the best officers of our country and our cities, states and counties. The Klan fought to keep aliens from being imported in this country. For many, many years we felt that we should not be a dumping ground for these aliens that come from foreign countries because they would break down ideas, and especially students from other countries, and we felt that they should not be naturalized and in three years be permitted to vote because we had to live here for twenty-one years before we was able to vote, up until some of the States put it down to eighteen years old. We felt that—we are always taught white supremacy, that we feel and we have advocated that the white man or white woman is superior to the negro race, and we felt we should never be dominated by the negro race, we are opposed to intermarriage of the races, that is the negro with the white."

Mr. Nikolin: Objection, Your Honor. Motion—
The Court: Overruled.

By Mr. Outcalt:

"Q. Mr. Venable, in the accomplishment of these purposes and aims of this organization, I will ask you how the

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National Knights of the Ku Klux Klan and the Klan groups of which you were familiar, intended to achieve these objectives?"

Mr. Nikolin: Objection.
The Court: Overruled.

By Mr. Outcalt:

"A. By trying to unite the white people and get them to use the ballot box and the boycott. I have advocated for many years that our sole salvation would be based solely on the ballot box to unify the people, christian white people together there, that we could keep our country safe from communism and socialism.

Q. Does the National Knights of the Ku Klux Klan or any of the groups that you have been affiliated with advocate achieving any of these means by violence?"

Mr. Nikolin: Objection.
The Court: Overruled.

By Mr. Outcalt:

"A. We do not tolerate that. That is, when I say that, the Imperial officers or officers in the States, even in the Klaverns, violence gets all of us in trouble, and if we want to accomplish anything, we can't afford to violate the law. I have told all of our Klan groups as well as those belonging to the National Association that we couldn't use any

type of violence, we had to obey the laws, whether it was good or bad. if we could unify, use the ballot box, we could accomplish this race war as you might call it.

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"Q. Now, when was the next time that there was, shall we say, a rebirth of the Klan in this country?"

Mr. Nikolin: Objection again.

The Court: I don't think we are interested—

Mr. Outcalt: Your Honor, this is 1915. His answer deals with 1915 when he was affiliated—

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Mr. Nikolin: "Mr. Venable, isn't it true that at every"—I ought to say Question there. "Mr. Venable, isn't it true that at every Klan meeting, that the citizens, as you call them, or members of the Klan—

A. Yes.

Q. —wear white robes and masks in order to disguise their identity, is that not true, sir? A. We did before they passed the law, you know. We do now in States where they permit it, but all of the States, even Georgia where the Klan was reborn, they have abandoned or abolished—making it illegal to have a mask on except private property or in a Klavern, not out on public property, it is a crime to do so. Most other States are the same.

Q. In 1964, on the 28th day of June, if a Klan rally was held on private property, the custom or the manner in con-

ducting that rally or meeting, whatever you might say, of the Klavern or Klan, would be customarily in white robes and masks, is that not true? A. It depends on what State, you know, some States will permit you to wear a robe and a hood or mask as you call it, without a mask over your face. Some will permit you to have a mask on if it is on property where you have a lease or rented it, or what we call private property, if you have a contract, either verbal

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or written.

Q. You don't know what the law in Ohio was on the 28th of June of 1962? A. No, I don't know. I mean, I believed they passed a statute in 1965—I mean, even on private property.

Q. So that prior to 1965, and specifically during 1964, even in Ohio— A. Yes, your law was practically the same as Georgia then, up until your new statute which prohibited it.

Q. So, the Klan prior to the passage in Ohio would conduct its meetings by the members of that Klan by wearing hoods, white hoods to disguise their identity, and white robes, is that not right, sir? A. That is right. Of course, I never have been too much in favor of wearing any mask or hood. I wear my robe, but if I put on a hood, I never have a mask over my face.

Q. But, that was the Klan custom, was it not, sir? A: Yes.

I have no further questions."

(Mr. Nikolin left the stand. Mr. Outcalt resumed the stand and read the deposition further as follows:)

"Redirect Examination by Mr. Outcalt:

Q. I would like to ask a couple on redirect Mr. Venable. Do you, as Imperial Wizard of the National Knights of the Ku Klux Klan know when and where meetings are con-

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ducted of that organization? A. If it was what we call an outside rally in any State, those officers are supposed to get permission, notify me that they are having a rally at a certain date and time, and they are supposed to get a contract in writing from the owner of that property, renting it or leasing it for that occasion.

Q. As Imperial Wizard, did you know of any meeting that was conducted in the City of Cincinnati on the 28th of June, 1964? A. No, I didn't have knowledge of that until that meeting was over, and I learned through communication, phone communication there had been some meeting there, and maybe some violations of some laws there. I learned it some several days after that, after an arrest was made of, I believe, Mr. Brandenburg.

Q. And, then, this meeting was not authorized by you prior to its being conducted? A. No, sir. As a rule, where a meeting is held in a State, we authorize somebody to conduct it, that is, be master of ceremonies, or we usually have some representative of the Imperial Staff, you know, either some member of it or some other outstanding Klansman, some officer of the Klan, to go there, maybe speak, try to preside over the meeting.

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(Deposition of WILLIAM HUGH MORRIS, Emperor, Knights of Ku Klux Klan.)

"Q. Would you describe what some of those are?"

These are aims and objectives.

"A. We are opposed to the encroachment of the Federal Government into the affairs purely—purely State and local affairs, because we believe that our freedom depends upon local self preservation. We are opposed to Communism, because it is Godless philosophy. We teach and inculpate into our members the doctrine and belief in white supremacy. We believe that this nation was founded by white men, and it never was in the contemplation of the founding fathers that the negroes would have any voice in this nation. And, history has told us that wherever they have been, they have left their blight. And, it is our purpose that they should not have equality with us or to men or dominion over us. We teach that because we believe it.

Q. Now, these things that are going on in the country which your organization has objection, do you intend—How do you intend to combat these things that you don't approve of?"

Mr. Nikolin: Objection.

The Court: Sustained.

Mr. Outcalt: Well, your Honor, I believe that this is talking about—

The Court: Why are you going into the history of the thing again? We have had enough history of it, and now we are concerned with what happened in this

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particular case and what happened at this particular meeting, and what, what was the purpose of this meeting there and—

Mr. Outcalt: Then Page 22, Question 16.

"Q. Does your organization believe in or condone violence to accomplish these means?"

Mr. Nikolin: Objection to that, your Honor.

The Court: He may answer.

By Mr. Outcalt:

"A. No, sir."

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"Q. What is the purpose or significance of the burning or lighting of a cross?"

Mr. Nikolin: Objection, your Honor.

The Court: Well, inasmuch as there was a cross burnt in this case, we'll permit the answer.

By Mr. Outcalt:

"A. It has a spiritual meaning to all Klan members, in the language of the ritualism, symbolism. In the language of the ritualism, the cross plays a very significant part in all Klan ritual. Now, we are reminded that the cross upon which our Saviour died, which is the criterion of character of every Klansman, prior to the crucification of Christ. The cross was an emblem of degradation and shame, and we are reminded that were it not for the shed of blood of Jesus Christ on that cross, our own lives would be full of degradation and shame. Now, the fiery cross has a tremendous spiritual significance to us, also, because we are

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reminded that Jesus Christ said, 'I am the Light of the World.' He also said, and then we are reminded that God

placed the flaming sword, guarded the entrance to the Garden of Eden with a flaming sword and he guided the Children of Israel on their journey to the Promised Land by piller of fire by night and piller of cloud by day. So, when we add fire to the cross, we simply are proclaiming to the world our fiery zeal. Fire is the greatest purifier yet known to man. So, we symbolically stand before the world in that manner.

Q. Does it— Excuse me, sir. Are you finished? A. So, then, as we stand in that manner, then we—that is fairly symbolic of our seal with the world, the whole world, on record of the purity of our purpose, because as fire purifies, the redeeming of the blood of Jesus Christ was shed on that cross, it is anything but sacrilegious to us to burn a cross."

. . . . . .

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. . . . . .

Q. Would you care to describe it? A. Because it is far more precious to mankind than all of the oils of the Ancients of India, and our life purpose is supposed to be as useful to humanity as water is to mankind. It has a very beautiful lesson.

I think that is all. You may cross-examine."

(Mr. Outcalt left the stand. Mr. Nikolin resumed the stand to read the deposition further as follows:)

By Mr. Nikolin:

"Q. Mr. Morris, the wearing of the mask at the various Klan functions is for the purpose of disguising the individual, is that not right, disguising the identity? A. Yes, in a material sense, yes, it could be construed as a disguise, certainly.

Q. Well, that is the purpose, is it not, that is the purpose of wearing the mask? A. Not altogether. It is worn actually as a memorial, and of course, that has this meaning to, they are all alike and a man that is not in the Klan is not judged by the fiber of his garment or his station in life, we are all as one, and that makes us all look just exactly alike.

I will interpose an objection to the answer as not being

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responsive to the question."

The Court: Go ahead, proceed.

By Mr. Nikolin:

"Q. Mr. Morris, the wearing of the mask at Klan functions, this does in fact disguise the individual, you can't see his identity. A. Hides the man's identity.

Q. That is right. A. Yes, sir, it does.

• • • • •

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Testimony of EUGENE NEUBER, TV Station WKRC photographer.

• • • • •

Cross Examination by Mr. Nikolin:

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Q. Mr. Neuber, I think this car that met you to direct you where to go, with several individuals, they were wearing white hoods, is that not right, sir? A. That's correct. There was visible from—there was a, one or two persons in the back seat which we could see that did have a hood on, or a mask.

Q. And, Mr. Neuber, when you were informed as to where you were going, or being assigned, you were told that this was a secret meeting of the Ku Klux Klan, isn't that correct? A. That's correct.

Q. And you were forewarned that you should or ought to be armed in some manner, isn't that correct?

Mr. Outcalt: I object.

The Court: Yes, any statement somebody else made—I didn't hear it—but any statement in the absence of the defendant—

Mr. Nikolin: Well, it's the same area in which he went, your Honor.

Q. Well, why did you have the guns, sir, let me ask you. Why did you and Al Leonard— A. I believe at the time we were informed by Mr. McPherson to—

Mr. Outcalt: I object.

The Court: Yes, any conversations in the absence of the defendant.

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Q. What was your purpose in having guns, let me ask you that way. A. Self protection, sir.

Q. Because you were going to this kind of a meeting, is that the answer? A. We were going into a place we felt that we were unaware of what it was, we had no idea what it was at the time. We were told it was to be a secret, closed meeting. And, we went in there with self protection on our, or near our self.

Q. Now, Mr. Neuber, when you arrived at this particular place and got into the meeting room, there were a number of individuals there who had both rifles, shotguns and

revolvers and pistols, isn't that correct, sir? A. I believe that is so, sir.

Q. And, as a matter of fact, when you got into this place, you were frightened yourself, weren't you, sir? A. We were a little bit on edge, due to the fact, like I stated before, we didn't know what it was or what was going to actually take place.

Q. Well, this caused you some concern, did it not?

Mr. Outcalt: I object.

Q. Some idea of fear, fright?

The Court: He has a right to cross-examine.

A. After we arrived there, I, I think, within a few moments the fear was over, as far as I am concerned.

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Q. You felt at that point that you weren't going to be harmed? A. That's correct.

• • • • •

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• • • • • •

(Closing arguments by counsel.)

The Court: Ladies and Gentlemen of the Jury: It is the duty of the Court to instruct you on the law in this case. Your oath requires you to accept the law as it is given by the Court, and to apply that law in your deliberations. You are not permitted to change the law, nor to apply your own conception of what you think the law should be.

The law presumes the defendant is innocent. This presumption remains with the defendant until it is overcome by proof beyond a reasonable doubt. Thus the defendant

is presumed innocent and must be acquitted unless the State produces evidence which convinces you beyond a reasonable doubt of each and every essential element of the crime charged in the indictment.

Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some

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possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves your minds in the condition that you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge.

The evidence in this case consists of the testimony received from the witnesses and the exhibits that have been offered in evidence. The evidence does not include the indictment, opening statements and closing arguments of counsel, and answers and statements that you were instructed to disregard.

The fact that an indictment was returned is not evidence. The indictment is the instrument used to inform a person accused of crime. You are not to consider the indictment, nor the fact that it was returned, as evidence for any purpose.

You must not speculate as to why the Court sustained the objection to any question, or what the answer to such question might have been. You must not draw any inference or speculate on the truth of any suggestion included in such a question which was not answered.

As I previously stated, the opening statements and the closing arguments of counsel are designed to assist you. They are not evidence.

To weigh the evidence you must consider the credibility of the witnesses. You will apply the tests of truthfulness which you are accustomed to apply in your daily lives.

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You may consider the appearance of the witness upon the stand; the manner of testifying; the reasonableness of the testimony; the opportunity the witness had to see or hear; accuracy of memory; frankness or lack of it; intelligence, interest and bias, if any; together with all the facts and circumstances surrounding the testimony.

You are the sole judges of the facts, the credibility of the witnesses and the weight of the evidence.

You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief according to the weight you assign to the testimony of each witness.

Some testimony was presented by way of deposition which were read to you. This evidence is to be considered in the same light, and is subject to the same tests that are applied to other witnesses.

You have your instructions on the evidence and the burden of proof. The Court will outline the specific issues.

The indictment accuses the defendant of Advocating Criminal Syndicalism. The indictment reads as follows:

> Court of Common Pleas, Hamilton County. During the term of July in the year 1964. Hamilton County. The Grand Jurors of the County of Hamilton, in the name and by the authority of the State of Ohio, upon
>
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>
> their oaths present that Clarence Brandenburg, on or about the 28th day of June, in the year 1964, at the County of Hamilton, State of Ohio, aforesaid, did un-

lawfully by word of mouth, advocate the necessity or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

Second Count. And the Grand Jurors of the County of Hamilton, in the name and by the authority of the State of Ohio, upon their oaths do further present that Clarence Brandenburg, on or about the 28th day of June, in the year 1964, at the County of Hamilton, and State of Ohio, aforesaid, did unlawfully, voluntarily, assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

Signed Raymond E. Shannon, Prosecuting Attorney; endorsed by the then foreman of the Grand Jury, James E. Raymond. Reported and filed on the 25th day of September, 1964 in this Court.

The Court brings to your attention the matter of circumstantial evidence. Circumstantial evidence is proof of certain facts and circumstances from which you may rea-

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sonably infer other related or connected facts which naturally and logically follow, according to the common experience of mankind.

You may not make one inference upon another inference but you may draw more than one inference from the same facts of circumstances.

Where conflicting inferences may be drawn from the same facts and circumstances, the defendant is entitled to the inference that is more consistent with his innocence.

Either direct or circumstantial evidence on each and every essential element of the crime is sufficient to warrant a finding of guilty if it satisfies you beyond a reasonable doubt. However, circumstantial evidence alone, on any one or on all essential elements of the crime does not justify a finding of guilty unless the circumstances are entirely consistent with the defendant's guilt and they are wholly inconsistent with any theory of the defendant's innocence and the circumstantial evidence is so convincing as to exclude all reasonable doubt of the defendant's guilt.

The Grand Jury Indictment, ladies and gentlemen, is the formal, legal charge that has been placed against this defendant. You will note that the indictment I have just read to you contains two counts—designated First Count and Second Count. The Court instructs you that each count in this indictment is to be considered by you as a separate charge, and you are to find the defendant guilty

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or not guilty in respect to each count in the indictment.

To this indictment the defendant entered a plea of not guilty as to each count. Such a plea is a denial of every fact in each count in the indictment, and puts in issue all the essential elements of the crime or crimes charged.

The State accuses the defendant of Advocating Criminal Syndicalism. Criminal Syndicalism is defined in the Ohio Revised Code, Section 2923.12 as follows:

> Criminal Syndicalism is the doctrine which advocates crime, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.

Section 2923.13 Ohio Revised Code is the section of Ohio law under which the defendant herein is charged, and this

section is as follows: And I will read to you only so much of the code section as is applicable to this case.

> No person shall by word of mouth, advocate the duty, necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.
>
> No person shall organize or help to organize or become a member of, or voluntarily assemble with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

Before you can find the defendant guilty in respect to the First Count in the indictment, you must find beyond a

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reasonable doubt the existence of the following elements:

> 1. That the defendant did, by word of mouth, advocate the duty, necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform.
>
> 2. That said act, if any, occurred in Hamilton County, State of Ohio, on or about June 28, 1964.

The Court will now explain the meaning of some of the terminology contained in these elements of the First Count in this indictment.

> To advocate means to speak in favor of; defend by argument; to support, vindicate, or recommend publicly.
>
> Unlawful method of terrorism is the use of terror and violence to intimidate, to subjugate, etc., when the methods used to accomplish such intimidation or subjugation are against the law.

Political reform as used in Ohio law refers to remodeling or changing the policy or the administration of government.

Violence is the unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury.

Crime is a violation of, or a neglect to perform, a legal duty of such importance to the protection of society that the state takes notice thereof and imposes

a penalty or punishment for such violation or neglect. In Ohio, no act is a crime unless specifically defined by the legislature and a penalty provided for the violation thereof.

You, ladies and gentlemen of the jury, will consider all of the evidence offered in this case in respect to Count One of the indictment. If you find beyond a reasonable doubt that the defendant did advocate the duty, necessity or propriety of crime or violence or unlawful methods of terrorism—any one of these would be sufficient to establish guilt —as a means of accomplishing political reform, then it will be your duty to find the defendant guilty as charged under the First Count in the indictment.

If you find that the defendant did not advocate the duty, necessity or propriety of crime, violence or unlawful methods of terrorism as a means of accomplishing political reform, then it will be your duty to find the defendant not guilty under the First Count in the indictment.

Coming now to the Second Count in the indictment. Before you can find the defendant guilty in respect to the Second Count in the indictment, you must find beyond a reasonable doubt the existence of the following elements:

1. That the defendant did unlawfully, voluntarily, assemble with a group or assemblage of persons formed to advocate criminal sydicalism.

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2. That said act of defendant, if any, occurred in Hamilton County, State of Ohio, on or about June 28, 1964.

The Court has again used the words "Criminal Syndicalism" in element 1 above, and since this term is not of general usage and understanding, the Court will repeat the definition of "Criminal Syndicalism".

> Criminal Syndicalism is the doctrine which advocates crime, violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform.

You will consider all the evidence that has been offered in respect to the Second Count in the indictment herein, and if you find beyond a reasonable doubt that the defendant did voluntarily assemble with any group, or assemblage of persons formed to advocate criminal syndicalism, then you will find the defendant guilty under the Second Count in the indictment.

If you do not, then you will find him not guilty, under the Second Count in the indictment.

The Court brings to your attention another section of the Ohio law.

> Whoever aids, abets, or procures another to commit an offense may be prosecuted and punished as if he were the principal offender.

In other words, a conspiracy is defined as a partnership in crime. Legally, it is defined as a combination of two or more persons, by some concerted action, to accomplish some

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criminal or unlawful purpose, or some purpose set in itself criminal or unlawful by criminal and unlawful means.

It is not necessary for the State to show that the parties actually met and agreed to enter a conspiracy. If one concurs, no proof of agreement to concur is necessary. As soon as the union of wills for the unlawful purpose is perfected, the conspiracy is complete. The joint assent of minds may be established as an inference from other facts proved. If one enters a conspiracy he may be guilty of a wrong which he did not specifically intend, if it followed from some other specific or joint unlawful purpose.

When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding according to the common plan, terminates in a criminal result, though not the particular result meant, all are liable. He who enters into a combination or conspiracy to do an unlawful act must be presumed to have understood the consequences which might reasonably be expected to flow from carrying it into effect, and also to have assented to the doing of whatever would reasonably or probably be necessary.

This, ladies and gentlemen, is a criminal case and in a criminal case it requires the concurrence of all twelve of your number before you can arrive at a verdict. The Court has prepared for your convenience four forms of verdict. These verdicts read as follows:

We, the Jury, in the issue joined, find the defendant,

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Clarence Brandenburg, guilty of violating Section

2923.13 Revised Code as he stands charged in the indictment.

And then there is a place, number twelve, a place—one, two, three, so on and so forth, to twelve, which every juror must sign his name, that concurs in that verdict.

Then there is another form of verdict.

We, the Jury, in the issue joined, find the defendant, Clarence Brandenburg—

The first one should have read, "Second Count." This is of the First Count.

—guilty as he stands charged in the First Count of the indictment, and not guilty on the Second Count.

No, that was read properly. And, which, likewise, there is a place for the signature of all twelve of you jurors, whoever concur in that particular form of verdict.

Then there is another form of verdict.

We, the Jury, in the issue joined, find the defendant, Clarence Brandenburg, guilty of violating Section 2923.13 as he stands charged in the Second Count of the indictment and not guilty on the First Count.

And then there is a form of verdict:

We, the Jury, in the issue joined, find the defendant, Clarence Brandenburg, not guilty.

And that form likewise has a place for the signature of all twelve of you ladies and gentlemen in the event

you should return that form of verdict.

When you go to your jury room your first duty will be to select one of your number as foreman or forelady to preside over your deliberations. It may either be a gentleman or lady on the jury.

It is essential to the preservation of the social order that laws be obeyed and violators be convicted. It is equally important that an innocent person should not suffer. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy, or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

The Court will place in your possession the indictment and the verdict forms, and the exhibits. The foreman or forelady will retain possession of these records, including the verdict, and return them to the courtroom. Until your verdict is announced in open court, you are not to disclose to anyone else the status of your deliberations or the nature of your verdict.

Judgment of Court of Appeals of Hamilton County

COURT OF APPEALS OF HAMILTON COUNTY

1968 Term

THE STATE OF OHIO,
HAMILTON COUNTY, *ss.*:

To the Honorable Court of Common Pleas.

GREETING:

Whereas, in a certain action, which was lately heard in our said Court of Appeals wherein the State of Ohio is the Appellee and Clarence Brandenberg is the Appellant the following Judgment was entered on the 16th day of February 1968 viz:

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas of Hamilton County, Ohio, and was argued by counsel, on consideration whereof, the Court finds there is no error apparent on the record in said proceedings and judgment, prejudicial to Appellant.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same hereby is, affirmed, and that Appellee recover from the Appellant, his costs herein expended, taxed at $.....

.....

And the Court being of the opinion that there was reasonable grounds for this appeal, allow no penalty.

It is further Ordered that a special mandate be sent to the Common Pleas Court of Hamilton County, Ohio, for execution upon this judgment. To all of which Appellant, by his counsel, excepts.

I, ROBERT D. JENNINGS, Clerk of the Court of Appeals of Hamilton County, do hereby certify that the above is a correct copy of the entry made by said Court in said cause as appears by the Journal of said Court, Page .....

WITNESS my hand and the seal of the said Court, at Cincinnati, this 16th day of February A.D., 1968

ROBERT D. JENNINGS, Clerk, Court of Appeals

By LAVERNE H. DUFFY, Deputy

Judgment of Supreme Court of Ohio

The cause, here on appeal as of right from the Court of Appeals for Hamilton County was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substanfial constitutional questional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 492

CLARENCE BRANDENBERG,

Appellant,

—v.—

PEOPLE OF THE STATE OF OHIO,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

ALLEN BROWN
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

CLARENCE BRANDENBERG,

Appellant,

—v.—

PEOPLE OF THE STATE OF OHIO,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Supreme Court of the State of Ohio entered on June 12, 1968, dismissing *sua sponte* the appeal from the Court of Appeals of the First Appellate District of Ohio, dated February 16, 1968, affirming the judgment of conviction rendered in the Court of Common Pleas, Hamilton County, Ohio on December 5, 1966. Appellant submits this statement to show that this Court has jurisdiction and that substantial questions are presented.

Opinion Below

There are no written opinions, either reported or unreported, in this case. The Judge assigned to write the opinion for the Ohio Court of Appeals died before completing it, and the Ohio Supreme Court issued no opinion.

Jurisdiction

This is an appeal from a conviction for violation of Ohio Revised Code ¶2923.13. The final judgment of the Ohio Supreme Court was entered on June 12, 1968 and the notice of appeal filed therein on June 25, 1968.

The jurisdiction of the Supreme Court to review the decision of the Ohio Supreme Court by direct appeal is conferred by Title 28, United States Code, Section 1257(2) and is sustained by *DeVeau* v. *Braisted,* 363 U. S. 744 (1960), and *Schware* v. *Board of Bar Examiners,* 353 U. S. 232 (1957).

Questions Presented

1. Whether Ohio Revised Code Sec. 2923.13, which prohibits advocacy of criminal syndicalism, violates the First and Fourteenth Amendments on its face.

2. Whether Ohio Revised Code Sec. 2923.13, which prohibits advocacy of criminal anarchy, violates the First and Fourteenth Amendments as construed and applied in this case.

3. Whether there was any evidence to sustain a conviction under Sec. 2923.13 of the Ohio Revised Code, as required by the due process clause of the Fourteenth Amendment.

Statutes Involved

Ohio Revised Code ¶2923.13. *Advocating criminal syndicalism.*

No person shall by word of mouth or writing advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform; or print, publish, edit, issue, or knowingly circulate, sell, distribute, or publicly display any book, paper, document, or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence, or unlawful methods of terrorism; or openly, willfully, and deliberately justify, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence, or unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or organize or help to organize or become a member of, or voluntarily assemble with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.

Ohio Revised Code ¶2923.12. *Criminal Syndicalism.*

As used in Sections 2923.13 to 2923.15 inclusive of the Revised Code, "criminal syndicalism" is the doctrine

which advocates crime; sabotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform.

Statement of the Case

Appellant was indicted and convicted in the Court of Common Pleas, Hamilton County, Ohio for advocating "the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform," and in a second count for voluntarily assembling "with a group or assemblage of persons formed to advocate the doctrines of criminal syndalism,"[1] both violations of Section 2923.13 of the Ohio Revised Code. For these crimes of advocacy and assembly, appellant was sentenced to a prison term of from one to ten years and fined $1,000.

The events upon which the conviction was based were depicted at trial in two films that were offered into evidence by the state (R. 15, 23). The announcer-reporter who helped make the film testified that he had received a telephone invitation from an unknown party to appear at a rally, identified to him as a Ku Klux Klan meeting to be held on private property (R. 4). He testified that on June 28, 1964 he helped make a sound film of portions of the meeting for showing on television with the consent and cooperation of the persons participating (R. 8).

---

[1] Sentence has thus far been stayed. On August 26, 1968 counsel mailed to the Clerk of this Court a Motion to Continue Supersedeas Bond in Effect and an Entry Continuing Stay of Execution During Pendency of Appeal.

The film produced at trial showed that no crowd was gathered or onlookers present besides those participating in the meeting. Nor was any disturbance or call for violence, abstract or otherwise, evident from the film or transcript.

One scene showed ten to twenty hooded figures, some of whom carried long arms, gathered outdoors around a large wooden cross wrapped in rags. During the film the cross was lit[2] and voices in the crowd unidentified either in the film or elsewhere in the record, offered a series of incomplete phrases and political slogans, some derogatory of Negroes and in one instance of Jews (R. 15):

"I would like to"
"How far is the nigger going to—yeah"
"Over there"
"This is what we are going to do to the niggers"

---

[2] William Morris, a longtime Klansman, who has written about the organization, was deposed about the meaning of the burning cross:

"It has a spiritual meaning to all Klan members, in the language of the ritualism, symbolism . . . . Now, we are reminded that the cross upon which our Saviour died, which is the criterion of character of every Klansman, prior to the crucification of Christ. The cross was an emblem of degradation and shame, and we are reminded that were it not for the shed [sic] of blood of Jesus Christ on that cross, our own lives would be full of degradation and shame. Now, the fiery cross has a tremendous spiritual significance to us, also, because we are reminded that Jesus Christ said, 'I am the Light of the World.' He also said, and then we are reminded that God placed the flaming sword, guarded the entrance to the Garden of Eden with a flaming sword and he guided the Children of Israel on their journey to the Promised Land by pillar of fire by night and pillar of cloud by day. So, when we add fire to the cross, we simply are proclaiming to the world our fiery zeal. Fire is the greatest purifier yet known to man. So, we symbolically stand before the world in that manner" (R. 186-187).

"I would like to ask—call this—Patrick"
"A dirty nigger"
"Send the Jews back to Israel"
"I'm for it"
"Let's give them back to the dark garden"
"Save America"
"Let's go back to constitutional betterment"
"Bury the niggers"
"We intend to do our part"
"Give us our state rights"
"Freedom for the whites"
"Nigger will have to fight for every inch he gets from now on"

Another scene in the same film depicted a man in a red hood, who announced in a calm and ordinary voice that this meeting was an organization meeting and that a march on Congress was planned:

"This is an organizers meeting. We have had quite a few members here today which are—we have hundred, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our president, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.

"We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups—one group to march on St. Augustine,

Florida, the other group to march into Mississippi. Thank you" (R. 15).

The second film taken indoors showed six hooded figures, some of them armed, and an unarmed figure in a red hood behind a table on which had been placed a Bible. He made virtually the same announcement, though somewhat shorter, as that made in the prior scene, omitting any reference to "revengeance" (sic) (R. 23). He added: "I can quote—personally, I believe the nigger should be returned to Africa, the Jew returned to Israel. Thank you" (R. 23).

The prosecution presented no other evidence except the various objects appearing in the film (R. 79), testimony intended to identify appellant as the hooded figure who made the two individual statements (R. 56, 97, 107), and testimony as to the location at which the meeting was held (R. 12). The prosecution presented no evidence of the nature of the Ku Klux Klan, of the presence of a clear and present danger or of any danger whatsoever surrounding the meeting. The state rested on the words and peaceful activities depicted in the film.

Although the defense did not introduce testimony, appellant submitted depositions and other written evidence from Klan officials (R. 134 *et seq.*) as to the fraternal nature of the Klan and its organizational prohibition against violence. In his deposition, James R. Venable, an attorney and Imperial Wizard (President) of the National Knights of the Ku Klux Klan Association of America reported:

"We do not tolerate [violence]. That is, when I say that, the Imperial officers or officers in the States, even in the Klaverns, violence gets all of us in trouble,

> and if we want to accomplish anything, we can't afford to violate the law. I have told all of our Klan groups as well as those belonging to the National Association [for the Advancement of White People] that we couldn't use any type of violence, we had to obey the laws, whether it was good or bad, if we could unify, use the ballot box, we could accomplish this race war as you might call it" (R. 157).[3]

The Court in charging the jury (R. 208-220) indicated that mere advocacy and assembly were sufficient to constitute violations of the statutes (R. 213-216). The Court's charge did not refer to clear and present danger or to any other First Amendment standard. Nor was there an instruction that the jury need find the aims and purpose of appellant's meeting or of the Klan. The Court charged *sua sponte* as to conspiracy on the assemblage count but did not offer a delimiting instruction on conspiracy in the area of First Amendment rights (R. 216-217). The appellant was convicted on both counts.

The constitutional questions were first raised by appellant's motion to quash the indictment and the memorandum in support thereof on the ground that the statute was unconstitutional on its face and as applied because it violated the First and Fourteenth Amendments.[4] The motion was overruled on February 24, 1965 without opinion.[5] After some delay, the case proceeded to trial in November 1966.

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[3] For other testimony on the philosophy of the Klan and its organizational restriction against violence, see R. 137, 183-184.

[4] Certified Record, Court of Appeals, First Appellate District of Ohio, Motion to Quash; Memorandum in Support of Motion to Quash.

[5] *Id.*, Entry Overruling Motion to Quash.

After trial appellant renewed the First Amendment questions and raised the objection that the verdict was against the evidence.[5a]

On appeal to the Court of Appeals of the First Appellate District of Ohio, appellant argued that his First and Fourteenth Amendment rights had been violated and that the state had violated due process by failing to submit any evidence that would have sustained a conviction.[6] The Court affirmed without opinion.

On appeal to the Ohio Supreme Court, appellant again raised the constitutional questions asserted below.[7] The Ohio Supreme Court *sua sponte* dismissed the appeal for failure to raise a substantial question but issued no opinion.

The Questions Are Substantial

Appellant's conviction rests upon a criminal syndicalism statute whose language drastically curtails First Amendment freedoms. The Ohio courts have found the statute to be free from constitutional defect. Since the statute involved does not so much as approach the required First Amendment standards laid down by this Court, jurisdiction should be noted.

1. Section 2923.13 is unconstitutional on its face because it contains language almost identical to language held to violate the First Amendment in prior decisions of this

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[5a] *Id.*, Motion for New Trial.

[6] *Id.*, Assignments of Error and Brief of Defendant-Appellant.

[7] Certified Transcript of Record, Supreme Court of Ohio, Memorandum in Support of Jurisdiction.

Court. In particular, the statute struck down in *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967) is a virtual replica of Sec. 2923.13.[8]

Language held vague in *Keyishian* appears almost verbatim in the opening lines of Sec. 2923.13, although the requirement of wilfulness and deliberateness in the statute in *Keyishian* made it preferable to the statute at bar.[9] This Court found the "defect of vagueness" in language that punished one who "'by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine' of forceful overthrow of government." 385 U. S. at 599. This Court disapproved that language because "mere advocacy of abstract doctrine is apparently included" and because the language "could reasonably be construed to cover mere expression of belief." 385 U. S. at 600, 601. Like the New York statute at issue in *Keyishian* the Ohio statute here

> "is plainly susceptible of sweeping and improper application. It may well [restrain] one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims. See *Herndon* v. *Lowry,* 301 U. S. 242 . . . *Yates* v. *United States,* 354 U. S. 298 . . . *Noto* v. *United States,* 367 U. S. 290 . . . *Scales* v. *United States,* 367 U. S. 203 . . . " 385 U. S. at 599-600.

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[8] Though *Keyishian* was a test oath case and this is a criminal conviction, this Court has said: "Where, as here, protected freedoms of expression and association are similarly involved, we see no controlling distinction in the fact that the definition is used to provide a standard of criminality rather than the contents of a test oath." *Dombrowski* v. *Pfister,* 380 U. S. 479, 494 (1965).

[9] The relevant language of O.R.S. 2923.13 reads:

"No person shall by word of mouth or writing advocate or teach . . . "

Keyishian further found the use of the terms "advise" and "teach", also contained throughout Sec. 2923.13, to have infirmities similar to those it found in the term "advocate":

> "[I]n prohibiting 'advising' the 'doctrine' of unlawful overthrow does the statute prohibit mere 'advising' of the existence of the doctrine, or advising another to support the doctrine? Since 'advocacy' of the doctrine of forceful overthrow is separately prohibited, need the person 'teaching' or 'advising' this doctrine himself 'advocate' it? Does the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition?" 385 U. S. at 600.

Sec. 2923.13 similarly encompasses the teacher who "knowingly circulate[s] written matter . . . advising unlawful acts". It cannot therefore withstand the requirements of *Keyishian.*

The same similarity of language is to be found between the public display section of Sec. 2923.13 and Sec. 161 of the New York Penal Law, which this Court consulted for definitions of words at issue in *Keyishian.* Under Sec. 161 advocacy of criminal anarchy consisted of

> "publically display[ing] any book . . . containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence, or unlawful means." 385 U. S. at 599.[10]

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[10] The relevant words in Sec. 2923.13 forbid one to

> "publically display any book . . . containing or advocating, advising or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence, or unlawful methods of terrorism."

Of these words, this Court asked:

> "Does the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy? It is no answer to say that the statute would not be applied in such a case. We cannot gainsay the potential effect of this obscure wording on 'those with a conscientious and scrupulous regard for such undertakings.' *Baggett* v. *Bullitt,* 377 U. S. 360 . . ." *Ibid.*

This Court made the same analysis of the language in *Keyishian* which prohibited "distribution" of such matter in the manner proscribed in Sec. 2923.13. See 385 U. S. at 601.

Finally, the statutes at issue in *Keyishian* barred employment of members of listed organizations. Sec. 2923.13 sweeps even more broadly, lacking a requirement of scienter and punishing those who become a "member of, or voluntarily assemble with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndacalism." This Court reaffirmed in *Keyishian* its view that "[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not constitutionally adequate." *Scales* v. *United States,* 367 U. S. 203 (1961); *Yates* v. *United States,* 354 U. S. 298 (1957). 385 U. S. at 606. See also *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964); *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966).

Sec. 2923.13, so strikingly similar to the language disapproved in *Keyishian,* must also fall for vagueness and overbreadth. The Ohio statute is a broad regulation of speech of a kind long discredited by this Court. It is not narrowly

drawn so as to incorporate the teaching of *Noto* v. *United States,* 367 U. S. 290, 297-298 (1961) that "the mere abstract teaching of . . . theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." If "[p]recision of regulation must be the touchstone in an area . . . closely touching our most precious [First Amendment] freedoms," *NAACP* v. *Button,* 371 U. S. 415, 438 (1963), Sec. 2923.13 cannot stand.

2. Sec. 2923.13 explicitly prohibits speaking, writing and publishing and thus directly infringes First Amendment rights. It is therefore unconstitutional unless construed and applied so that it is limited to situations in which there is a clear and present danger of an evil the state may prohibit. *Schenck* v. *United States,* 249 U. S. 47 (1919); *Abrams* v. *United States,* 250 U. S. 616 (1919); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Pennekamp* v. *Florida,* 328 U. S. 331 (1946); *Craig* v. *Harney,* 331 U. S. 367 (1947); *Wood* v. *Georgia,* 370 U. S. 375 (1962). Since the Court of Appeals of Ohio specifically affirmed appellant's conviction and the Ohio Supreme Court *sua sponte* dismissed the appeal for lack of a substantial question,[11] appellant stands convicted for speech which the state failed to show

[11] Although appellant's case apparently presented the first opportunity for the Ohio Criminal Syndicalism Act to be applied to a set of facts, the Ohio courts chose not to place any delimiting interpretation on the statute. In *State* v. *Kassay,* 126 O. S. 177 (1932), the only prior case involving Sec. 2923.13, the trial court held that the statute violated the guarantee of free speech under the Ohio constitution. Under a procedure then in effect, the prosecuting attorney filed a bill of exceptions in the Ohio Supreme Court, allowing the question of the constitutionality of the Criminal Syndicalism Act to be brought up for decision as an abstract question,

had resulted in a clear and present danger or indeed in any danger at all.

The standards to which this Court has held the States respecting convictions affecting speech are the highest known to our law. In discussing the standard that has been most often applied to speech and association offenses, this Court has concluded:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the decree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furtherest boundaries of protected expression . . . They do no more than recognize a minimum compulsion of the Bill of Rights." [12]

More recently this Court redefined its approach, rejecting government contentions that a "balancing" of government against individual interests was proper:

> "Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we

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unrelated to any fact situation. The majority upheld the act, though acknowledging that the purview of the First Amendment of the federal Constitution was broader than the comparable section in the Ohio Bill of Rights. *Id.* at 187. Its finding of constitutionality was based on the view that that First Amendment did not apply to the states—a view even then contrary to *Gitlow* v. *New York*, 268 U. S. 652 (1925). Since the *Kassay* case, there have been no reported decisions construing the Ohio Criminal Syndicalism Act, and it appears that there were no convictions thereunder until appellant's conviction.

[12] *Bridges* v. *California*, 314 U. S. 252, 263 (1941).

have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way 'balanced' those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict. There is, of course, nothing novel in that analysis. Such a course of adjudication was enunciated by Chief Justice Marshall when he declared: 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but which consist with the letter and spirit of the constitution,* are constitutional.' *M'Culloch* v. *Maryland,* 4 Wheat 316, 421, 4 L ed 579, 605 (emphasis added by Supreme Court). In this case, the means chosen by Congress are contrary to the 'letter and spirit' of the First Amendment." [13]

The facts surrounding appellant's conviction render it unconstitutional under any standard put forth by this Court. In a meeting apparently staged for television, appellant solicited membership into the Ku Klux Klan and informed the television audience of a planned march. In the only reference even possibly construed as an allusion to violence he disclaimed revenge, though conceiving it pos-

[13] *United States* v. *Robel,* 389 U. S. 258, 268 n.20 (1967).

sible if "our President, our Congress, our Supreme Court continues [sic] to suppress the white, Caucasian race" (R. 15). There was no indication that this revenge—mentioned in the context of a political discussion—was not the usual political revenge normally pursued peacefully. Appellant was himself unarmed and neither advocated nor even referred to the use of arms.

Appellant's acts presented no danger to the state and certainly not the dangers recorded in prior cases where this Court nonetheless has upheld First Amendment rights. Appellant's speech was not "a general attack on all organized religious systems" of which there was evidence that "the hearers were in fact highly offended." *Cantwell* v. *Connecticut,* 310 U. S. 296, 309 (1939). There was no crowd of " 'muttering and grumbling' . . . onlookers". *Cox* v. *Louisiana,* 379 U. S. 536, 543 (1965), or " 'an actual interference with traffic and an imminently threatened disturbance of the peace of the community.' " *Edwards* v. *South Carolina,* 372 U. S. 229, 239 (1963). Nor does this case rise to the level this Court has required before a conviction for a speech may be sustained. Appellant did not speak "in a loud . . . voice . . . [giving] the impression that he was . . . urging that they rise up in arms and fight . . ." *Feiner* v. *New York,* 340 U. S. 315, 316, 317 (1950). A controversial word here and there during a peaceful, staged gathering where no violence was advocated does not deprive a speech or the meeting at which it occurs of First Amendment protection.

3. There was no evidence to sustain a conviction under Section 2923.13. Under the terms of the statute the state had the burden of showing advocacy, publication, organiza-

tion and assemblage,[14] to propagate criminal syndicalism, the doctrine defined under Ohio law as reform through violence. The state failed altogether in its burden, rendering appellant's conviction unconstitutional under the doctrine of *Thompson* v. *Louisville,* 362 U. S. 199 (1960). See also *Fields* v. *Fairfield,* 375 U. S. 248 (1963); *Garner* v. *Louisiana,* 368 U. S. 157 (1961).

The state chose to rest on the film and supplemental identification testimony. Yet neither the film nor transcript contain a scintilla of evidence of advocacy of reform through violence that would have satisfied count one. The evidence, as we have shown (pp. 5-7, *infra*), is to the contrary. Nor did the state attempt to satisfy that part of Sec. 2923.13 prohibiting voluntary assemblage with such a group, for it offered no proof of the purpose of the group assembled or of the Klan, as required to meet count two.

In *Fiske* v. *Kansas,* 274 U. S. 380 (1927) this Court invalidated a conviction under the Kansas Criminal Syndicalism Act containing language paralleling the Ohio statute at issue here. At trial, the only evidence offered of criminal syndicalism was the preamble of the organization's constitution advocating, *inter alia* that " 'between [the working class and the employing class] a struggle must go on until the workers of the world organize as a class, take possession of the earth, and the machinery of production and abolish the wage system' " 274 U. S. at 382-383. This Court said unanimously:

> "Consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime.

[14] The trial court gratuitously offered a charge in conspiracy, in the absence of conspiracy language from the statute, the indictment, or as part of the state's proof (R. 216-217).

> The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." 299 U. S. at 365.

DeJonge v. *Oregon,* 299 U. S. 353, 359 (1937), held that it was no crime for a speaker to urge attendance at a "meeting of the [Communist] party . . . and to bring their friends, to show their defiance of local police authority and to assist them in their revolutionary tactics." Can it therefore be illegal today to announce a peaceful march on Congress and on two Southern states, or even to suggest that some unnamed revenge may follow if the government doesn't change, or to express dislike for certain minority groups in a derogatory manner? Whatever the generally held view of the Klan, the state is held to its proof, especially where the crime charged consists of words and alleged association. The prosecution failed altogether to meet the most minimal evidential standards.

CONCLUSION

For the reasons stated above, jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

APPENDIX

Judgment Entry of the Supreme Court of Ohio

THE SUPREME COURT OF THE STATE OF OHIO

1968 Term

To wit: June 12, 1968

No. 68-132

THE STATE OF OHIO
City of Columbus

STATE OF OHIO,

Plaintiff-Appellee,

—vs.—

CLARENCE BRANDENBURG,

Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS

For Hamilton County

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent

to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this day of 19

/s/ THOMAS L. STARTZMAN, Clerk

Judgment of Affirmance

IN THE

COURT OF APPEALS

FIRST APPELLATE DISTRICT

HAMILTON COUNTY

OHIO

No. 10147

STATE OF OHIO,

Plaintiff-Appellee,

—VS.—

CLARENCE BRANDENBERG,

Defendant-Appellant.

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas of Hamilton County, Ohio, and was argued by counsel, on consideration whereof, the Court finds there is no error apparent on the record in said proceedings and judgment, prejudicial to Appellant.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same hereby is, affirmed, and that Appellee recover from the Appellant, his costs herein expended, taxed at $.

And the Court being of the opinion that there was reasonable grounds for this appeal, allow no penalty.

It is further Ordered that a special mandate be sent to the Common Pleas Court of Hamilton County, Ohio, for execution upon this judgment. To all of which Appellant, by his counsel, excepts.

* * * * *

To the Clerk:

This judgment is approved. Enter upon the journal of the court.

JUDGE BERT H. LONG
Presiding Judge

SUPREME COURT, U. S.

FILED
OCT 18 1968
JOHN F. DAVIS, CLERK

No. 492

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

CLARENCE BRANDENBERG,
Appellant,

vs.

PEOPLE OF THE STATE OF OHIO,
Appellees.

BRIEF OF APPELLEES IN OPPOSITION TO JURISDICTION

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In The

Supreme Court of the United States

October Term, 1968

No. 492

CLARENCE BRANDENBERG,
Appellant,

vs.

PEOPLE OF THE STATE OF OHIO,
Appellees.

BRIEF OF APPELLEES IN OPPOSITION TO JURISDICTION

ISSUES PRESENTED

1. Is *Ohio Revised Code Section 2923.13* unconstitutional, either on its face or as applied in this case?

2. Was there evidence to sustain a conviction under *Ohio Revised Code Section 2923.13*?

STATUTES INVOLVED

Ohio Revised Code Section 2923.13 — Advocating Criminal Syndicalism:

> "No person shall by word of mouth or writing advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform; or print, publish, edit, issue, or knowingly circulate, sell, distribute, or publicly display any book,

paper, document, or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence, or unlawful methods of terrorism; or openly, willfully and deliberately justify, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence, or unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or organize or help to organize or become a member of, or voluntarily assemble with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both."

Ohio Revised Code Section 2923.12 — Criminal Syndicalism:

"As used in sections 2923.13 to 2923.15, inclusive, of the Revised Code, 'criminal syndicalism' is the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform."

STATEMENT OF FACTS

In this case the defendant-appellant made pre-arrangements with a T.V. reporter and a T.V. cameraman for their attendance at a "Ku Klux Klan" rally and meeting held in Hamilton County, Ohio, on June 28, 1964. The rally and meeting were recorded by them on sound film and were broadcast over a local (as well as network) T.V. station outlet. The persons attending the rally-meet-

ing wore robes and hoods with holes for their eyes, and were armed with shotguns, rifles and "another weapon". (T. page 5).

The leader of the group, identified at the trial as being the defendant-appellant (T. pages 10, 11, 17, 40, 41, 45, 46, 56, 57, 70 and 74), wore a red robe and hood and made the following statements to the rally meeting:

> "I would like to — how far is the nigger going to — yeah. Over there. This is what we are going to do to the niggers. I would like to ask — call this — Patrick. A dirty nigger. Send the Jews back to Israel. I'm for it. Let's give them back to the dark — garden. Save America. Bury the niggers. We intend to do our part.
>
> Give us our state rights. Freedom for the whites. Nigger will have to fight for every inch he gets from now on.
>
> This is an organizers meeting. We have had quite a few members here today which are — we have hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, caucasian race, it's possible that there might have to be some revengeance taken.
>
> We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups — one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

The defendant-appellant was subsequently arrested and indicted for violating *Section 2923.13, Ohio Revised Code (Criminal Syndicalism)*.

The defendant-appellant was indicted in September, 1964, but because of motions, continuances and the taking of numerous depositions at his request, trial was not had until November 28, 1966. As a result of that trial, which concluded on December 5, 1966, the jury returned a verdict of "guilty" on both counts of the indictment.

A Motion for a New Trial was overruled and, thereafter, appellant appealed to the Court of Appeals for the First Appellate District of Ohio, and said Court subsequently affirmed the conviction of the lower court.

Defendant-appellant then appealed to the Ohio Supreme Court, which affirmed the conviction without an opinion.

ARGUMENT AS TO ISSUES NOS. 1 AND 2

It is the contention of the appellees in this matter that the issues involved are of neither great public importance nor are there substantial constitutional issues involved. It is the further contention of the appellees that this case is strictly one of whether or not there was sufficient evidence to support the charges brought against the said defendant-appellant. The case was submitted to a jury on the evidence presented. This verdict was sustained by way of a Motion for a New Trial and an affirmance both in the Court of Appeals and in the Supreme Court of Ohio.

ISSUE NO. ONE

Ohio Revised Code Section 2923.13 has previously been declared to be constitutional in the case of *State* v. *Kassay*, 126 O. S. 177. In a similar criminal syndicalism statute in California, this Court held in *Whitney* v. *California*, 224 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095, that the question of whether or not one attending a Communistic

convention intended to assist in the organization of a Communist Party with knowledge of its unlawful character and purpose is one of fact, a finding of which by the jury, affirmed by the reviewing court, is not open to review by the Supreme Court. The Court further held in that case that freedom of speech, which is secured by the Constitution, does not confer an absolute right to speak without responsibility whatever one may choose, or an unrestricted and unbridled license giving immunity to every possible use of language and punishing those who abuse their freedom. We are not arguing against the bare and fundamental rights of freedom of speech, freedom of the press, freedom of peaceable assembly, etc. Nor are we arguing against the cases of *Gitlow* v. *New York,* 268 U. S. 652; *DeJonge* v. *Cregan,* 299 U. S. 353; *Herndan* v. *Lowry,* 301 U. S. 242; and many others cited which recite that legal premise. It is to be noted that the Supreme Court was not in those cases confining and restricting itself to just that proposition. On the contrary, in the *Gitlow* case the syllabi state:

> "2. Freedom of speech and of the press, as secured by the Constitution, is not an absolute right to speak or publish without responsibility whatever one may choose or an immunity for every possible use of language.
>
> "3. That a State, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace, is not open to question.
>
> "6. Such utterances present sufficient danger to the public peace and security of the State to bring their punishment clearly within the range of legislative discretion even if the effect of a given utterance cannot accurately be foreseen.

"7. A State cannot reasonably be required to defer taking measures against these revolutionary utterances until they lead to actual disturbances of the peace or imminent danger of the State's destruction."

And, on page 670 of the Opinion (in *Gitlow*), the Court stated the following, after first upholding the constitutionality of the (New York) statute:

> "This being so (the constitutionality of the statute) it may be applied to every utterance — not too trivial to be beneath the notice of the law — which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibition class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition."

In the case of *Bullock* v. *United States,* 265 F. (2d) 683, *certiorari denied* 78 S. Ct. 54, the Court stated that the guarantee of "free speech" does not include the right to persuade others to violate the law. There are too many cases on this subject to cite and here belabor the argument.

It is not argued that the Ohio Legislature was without power to enact *Section 2923.13, of the Revised Code of Ohio* (under the police power), it is argued that it violated the defendant-appellant's rights under the First Amendment.

The fourth syllabus of *State* v. *Kassay,* 126 O. S. 177, upholds the validity of "criminal syndicalism" statutes of

Ohio. Chief Justice Marshall, speaking for a majority of the Court, in upholding the constitutionality of the (criminal syndicalism) statute, cited *People* v. *Most,* 171 N. Y. 423; *Frohwerk* v. *U. S.,* 249 U. S. 204 (at 206); *Gitlow* v. *New York,* 268 U. S. 652; and many others. The law of that syllabus (in *Kassay*) was followed in *Cincinnati* v. *King,* 6 O. O. (2d) 313, and is the law today.

Although some of the states' criminal syndicalism statutes are aimed specifically at doctrines pertaining to the overthrow of the government by force, other states have legislated against any advocacy of crime or violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform. Ohio's statutes fall within the latter group.

It is apparent that almost all of the reported cases, as being supportive of the law on the subject encompassed in this issue, deal with communism, sedition, espionage, and the like. Nevertheless, it is submitted that the principle is the same and, stated in essence, it is, simply, that although the First Amendment prohibits legislation against free speech it does not give immunity for every possible use of language. (*Frohwerk* v. *United States,* 249 U. S. 204).

Since some space has been devoted to a discussion of the "present danger" test, and conceding that the United States Supreme Court has repeatedly declared that the necessity for a valid restriction (to protect the state and its people from crime, violence, terrorism, etc.) does not exist unless the speech is reasonably calculated to cause imminent danger, it is submitted that this matter is not for consideration in determining the validity of the statute; it can arise only at the trial. (*State* v. *Kassey,* at page 186).

The Smith Act was upheld in the case of *Dennis* v. *United States,* 341 U. S. 494, 95 L. Ed. 1137, 71 S. Ct. 857.

In the case of *Yates* v. *United States,* 354 U. S. 298, 1 L. Ed. (2d) 1356, 77 S. Ct. 1064, the Court reaffirmed the validity of the Smith Act. In particular, the Court went into the definition of the term "advocate" as used in that Statute. The Court refused to declare the Statute unconstitutional on that term. It went on to define the term "advocate" as not being a mere abstract doctrine but to advocate action. In fact, the Court, in that case, indicated that the term covered the advocacy of a future act rather than a limited terminology of an immediate act.

The Court went on to say at page 1378:

> "the essential distinction is that those to whom the advocacy is addressed must be urged to do something now or in the future, rather than merely believe in something."

The appellant has laid great weight and stress on the case of *Keyishian* v. *Board of Regents,* 385 U. S. 589, 17 L. Ed. (2d) 629, 87 S. Ct. 675. The factual background of that case is completely different from the facts before this Court. The law in question in that case involved administrative rulings and the rights of teachers to teach and what they could teach. The Court said in that case, at page 640:

> "our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to teachers concerned. That freedom is therefore a special concern of the First Amendment which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools * * * Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

The above certainly is not the factual case nor background of the case currently before the Court. This is not a case of teaching abstract doctrines, or even teaching. This is a case of hooded men with guns and weapons gathering together and being worked up to a pitch to take specific action at a specific time. Using the above terms of the Court, the evidence did not disclose that the defendant was to inquire, to study, to evaluate, or to gain new maturity.

We therefore believe that the Ohio law in question is constitutional under the United States Constitution. There is no doubt in its terminology. Abstract rules and definitions can be read into any statute. We do not believe that the Court is desirous of going into and declaring statutes unconstitutional on remote abstract possibilities which are far from the facts of the case before the Court. The issue is basically one fact, and not the constitutionality of a statute.

As the Court held in *Dennis* v. *United States,* 341 U. S. 494, 95 L. Ed. 1137, 71 S. Ct. 857, at page 516:

> "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with scrupulous care demanded by our Constitution. But we are not convinced that because there may be borderline cases at some time in the future, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the Statute."

We therefore respectfully submit that the Ohio law in question is constitutional, in that it violates neither the First nor Fourteenth Amendments, either on its face, or as construed and applied in this case.

ISSUE NUMBER TWO

It is the belief of appellees that there was sufficient proof to sustain the conviction. As set forth in the factual statement, the facts indicate that there were several men at a rally meeting of the "Ku Klux Klan", who were wearing hoods and robes and who were armed with shotguns, rifles, and "another weapon". It was shown that the crime was committed within the territorial jurisdiction of the Court on the date charged and that the defendant was one of the leaders in the group and spoke out on several occasions, with the quotes attributed to him in the factual statement. The defendant was specifically identified as the person making the statements. He was not, as the Court stated in the Keyishian case, supra, inquiring, studying, or evaluating an idea. He was haranguing the group to specific course of action on a specific date, toward violence and unlawful terrorism as a means of accomplishing political reform.

The surrounding facts and circumstances were also considered by the Court and jury. This is not the case of a man by himself in an open desert yelling "fire"; but rather the case of a man in an open crowded theater wing using the same exact word. The jury had every right to consider why the hoods. They also had the right to consider why these men, to whom the defendant was speaking, had shotguns, rifles and another weapon. They also had the right to consider the background and secrecy of this meeting. Using this background, we respectfully submit that it was a jury question to determine whether the words of the defendant-appellant were words which urged men to do something now or in the future, or whether they were words indicating a mere belief in something, or an abstract discussion of something.

Appellant's counsel further states that there was no evidence of the purpose of the group assembled in order

to meet the requirements in the second count of the indictment. A jury can clearly infer the intent and purpose of an individual or group by that person's, or group's, actions.

Certainly with all of the above mentioned background and evidence, plus other evidence at the time of trial, the jury could determine if the group's purpose fell within the terms of the crime charged.

It is respectfully submitted that this cause, having been tried to a jury, it was a question of fact for the jury to determine from the evidence and testimony adduced, whether the defendant-appellant violated the applicable provisions of *Section 2923.13, Ohio Revised Code.* A review of the record will show clearly that the verdict (of the jury) was based upon, and supported in fact by, evidence sufficient in law to establish the guilt of the defendant-appellant.

The import and meaning of the defendant-appellant's words having been submitted to the jury for determination, under the circumstances under which they were made (secret meeting, hooded men armed with guns), and having been thus resolved, it is submitted that counsel's (for defendant-appellant) effort to substitute his understanding or appraisal of that language, in the argument on this appeal, is without meaning or materiality.

The basic question is, was there evidence adduced from which the jury could have reached its verdict even though, as appellant's counsel has stated, other persons might have reached a different verdict? The law is quite clear that where there is some evidence upon which a jury could have reached a verdict that that verdict will not be set aside, unless the finding of the jury is unsupported by any evidence.

CONCLUSION

In conclusion, we respectfully submit that the Court should deny the appeal because:

1. The Statute is not unconstitutional on its face as violative of the First and Fourteenth Amendments.

2. The Statute is not unconstitutional in this case, as applied and construed, as violative of the First and Fourteenth Amendments.

3. There was more than a sufficient amount of evidence to sustain the finding and verdict of the jury.

It is therefore submitted that no substantial questions are presented by the appeal, and that the judgment of the lower courts should be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

JAN 7 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 492

CLARENCE BRANDENBURG, *Appellant,*

—v.—

STATE OF OHIO, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 492

CLARENCE BRANDENBURG,

Appellant,

—v.—

PEOPLE OF THE STATE OF OHIO,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR APPELLANT

Opinions Below

There are no written opinions, either reported or unreported, in this case. The Judge assigned to write the opinion for the Ohio Court of Appeals died before completing it, and the Ohio Supreme Court issued no opinion.

Jurisdiction

This appeal is from the final judgment of the Supreme Court of the State of Ohio entered on June 12, 1968, dismissing *sua sponte* the appeal from the Court of Appeals of the First Appellate District of Ohio, dated February 16, 1968, affirming the judgment of conviction rendered in the Court of Common Pleas, Hamilton County, Ohio on

December 5, 1966. Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Ohio on June 25, 1968. The Jurisdictional Statement was filed on September 9, 1968 and probable jurisdiction was noted on November 18, 1968. Appellants sought and were granted an enlargement of time until January 7, 1969 to file this brief. Jurisdiction on appeal is conferred by 28 U. S. C. §1257(2).

Statutes Involved

Ohio Revised Code ¶2923.13. *Advocating criminal syndicalism.*

> No person shall by word of mouth or writing advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform; or print, publish, edit, issue, or knowingly circulate, sell, distribute, or publicly display any book, paper, document, or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence, or unlawful methods of terrorism; or openly, willfully, and deliberately justify, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence, or unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or organize or help to organize or become a member of, or voluntarily assemble with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.

Ohio Revised Code ¶2923.12. *Criminal Syndicalism.*

As used in Sections 2923.13 to 2923.15 inclusive of the Revised Code, "criminal syndicalism" is the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform.

Questions Presented

1. Whether Ohio Revised Code ¶2923.13, which prohibits advocacy of criminal syndicalism, violates the First and Fourteenth Amendments on its face.

2. Whether Ohio Revised Code ¶2923.13, which prohibits advocacy of criminal anarchy, violates the First and Fourteenth Amendments as construed and applied in this case.

3. Whether Ohio Revised Code ¶2923.13, which prohibits criminal syndicalism directed against the United States and the State of Ohio is preempted by Federal legislation.

4. Whether there was any evidence to sustain a conviction under ¶2923.13 of the Ohio Revised Code, as required by the due process clause of the Fourteenth Amendment.

Statement of the Case

Appellant was indicted and convicted in the Court of Common Pleas, Hamilton County, Ohio for advocating "the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform," and, on a second count, for voluntarily assembling "with a group or assemblage of persons formed to advocate the doctrines of criminal syndalism," both violations of ¶2923.13 of the Ohio Revised Code. For these crimes of advocacy and assembly, appellant was sentenced to a prison term of from one to ten years and fined $1,000.

The events upon which the conviction was based were depicted at trial in two films that were offered into evidence by the state (A. 17, 24). The announcer-reporter who helped make the film testified that he had received a telephone invitation from an unknown party to appear at a rally, identified to him as a Ku Klux Klan meeting to be held on private property (A. 8, 12). He testified that on June 28, 1964 he helped make a sound film of portions of the meeting for showing on television with the consent and cooperation of the persons participating (A. 12).

The film produced at trial showed that no crowd was gathered or onlookers present besides those participating in the meeting. Nor was any disturbance or call for violence, abstract or otherwise, evident from the film or transcript.

One scene showed ten to twenty hooded figures, some of whom carried long arms, gathered outdoors around a large wooden cross wrapped in rags. During the film the cross

was lit[1] and voices in the crowd unidentified either in the film or elsewhere in the record, offered a series of incomplete phrases and political slogans, some derogatory of Negroes and in one instance of Jews (A. 17, 18):

"I would like to"
"How far is the nigger going to—yeah"
"Over there"
"This is what we are going to do to the niggers"
"I would like to ask—call this—Patrick"
"A dirty nigger"
"Send the Jews back to Israel"
"I'm for it"
"Let's give them back to the dark garden"
"Save America"
"Let's go back to constitutional betterment"
"Bury the niggers"
"We intend to do our part"
"Give us our state rights"

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[1] William Morris, a long-time Klansman, who has written about the organization, was deposed about the meaning of the burning cross:

"It has a spiritual meaning to all Klan members, in the language of the ritualism, symbolism . . . . Now, we are reminded that the cross upon which our Saviour died, which is the criterion of character of every Klansman, prior to the crucification of Christ. The cross was an emblem of degradation and shame, and we are reminded that were it not for the shed [sic] of blood of Jesus Christ on that cross, our own lives would be full of degradation and shame. Now, the fiery cross has a tremendous spiritual significance to us, also, because we are reminded that Jesus Christ said, 'I am the Light of the World.' He also said, and then we are reminded that God placed the flaming sword, guarded the entrance to the Garden of Eden with a flaming sword and he guided the Children of Israel on their journey to the Promised Land by pillar of fire by night and pillar of cloud by day. So, when we add fire to the cross, we simply are proclaiming to the world our fiery zeal. Fire is the greatest purifier yet known to man. So, we symbolically stand before the world in that manner" (A. 68, 69).

"Freedom for the whites"

"Nigger will have to fight for every inch he gets from now on"

Another scene in the same film depicted a man in a red hood, who announced in a calm and ordinary voice that this meeting was an organization meeting and that a march on Congress was planned:

"This is an organizers meeting. We have had quite a few members here today which are—we have hundred, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our president, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.

"We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups—one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you" (A. 17, 18).

The second film taken indoors showed six hooded figures, some of them armed, and an unarmed figure in a red hood behind a table on which had been placed a Bible. He made virtually the same announcement, though somewhat shorter, as that made in the prior scene, omitting any reference to "revengeance" (sic) (A. 24). He added: "I can quote—personally, I believe the nigger should be returned to Africa, the Jew returned to Israel. Thank you" (A. 24).

The prosecution presented no other evidence except the various objects appearing in the film (A. 51), testimony intended to identify appellant as the hooded figure who made the two individual statements (A. 43, R. 97, R. 107),[2] and testimony as to the location at which the meeting was held (A. 9). The prosecution presented no evidence of the nature of the Ku Klux Klan, of the presence of a clear and present danger or of any danger whatsoever surrounding the meeting. The state rested on the words and peaceful activities depicted in the film.

Although the defense did not introduce testimony, appellant submitted depositions and other written evidence from Klan officials (R. 134 *et seq.*) as to the fraternal nature of the Klan and its organizational prohibition against violence. In his deposition, James R. Venable, an attorney and Imperial Wizard (President) of the National Knights of the Ku Klux Klan Association of America reported:

> "We do not tolerate [violence]. That is, when I say that, the Imperial officers or officers in the States, even in the Klaverns, violence gets all of us in trouble, and if we want to accomplish anything, we can't afford to violate the law. I have told all of our Klan groups as well as those belonging to the National Association [for the Advancement of White People] that we couldn't use any type of violence, we had to obey the laws, whether it was good or bad, if we could unify, use the ballot box, we could accomplish this race war as you might call it" (A. 63, 64).

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[2] R. refers to the original record on file with the Clerk of Court. A. refers to the printed Appendix.

For other testimony on the philosophy of the Klan and its organizational restriction against violence, see A. 67, R. 137.

The Court in charging the jury indicated that mere advocacy and assembly were sufficient to constitute violations of the statutes (A. 76-79). The Court's charge did not refer to clear and present danger or to any other First Amendment standard. Nor was there an instruction that the jury need find the aims and purpose of appellant's meeting or of the Klan. The Court charged *sua sponte* as to conspiracy on the assemblage count but did not offer a delimiting instruction on conspiracy in the area of First Amendment rights (A. 79-80). The appellant was convicted on both counts.

The constitutional questions were first raised by appellant's motion to quash the indictment and the memorandum in support thereof on the ground that the statute was unconstitutional on its face and as applied because it violated the First and Fourteenth Amendments (A. 3). The motion was overruled on February 24, 1965 without opinion (A. 4). After some delay, the case proceeded to trial in November 1966. After trial appellant renewed the First Amendment questions and raised the objection that the verdict was against the evidence (A. 5).

On appeal to the Court of Appeals of the First Appellate District of Ohio, appellant pressed the constitutional issues but the Court affirmed without opinion.

On appeal to the Ohio Supreme Court, appellant again raised the constitutional questions asserted below. The Ohio Supreme Court *sua sponte* dismissed the appeal for failure to raise a substantial question but issued no opinion.

ARGUMENT

I.

Ohio Revised Code Para. 2923.13 is unconstitutional on its face and as authoritatively construed because it imposes criminal sanctions on the exercise of the rights of expression and assembly protected by the First and Fourteenth Amendments.

Appellant was indicted for violating two portions of ¶2923.13: the clause that prohibits the use of "crime, sabotage, violence, or unlawful methods of terrorism" to achieve "political reform;" and the clause that makes it a crime to "voluntarily assemble with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

The only definition contained in the Ohio Code is of "Criminal Syndicalism" in ¶2923.12, which states that it is "the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform."

Moreover, none of the three Ohio courts which considered this case rendered an opinion. The Ohio Supreme Court, *sua sponte,* dismissed appellant's appeal for lack of a substantial question. By letting appellant's conviction stand, the Supreme Court of Ohio thus adopted the construction of ¶2923.13 that was contained in the trial court's charge to the jury. This charge broadly defined the operative terms in the statute and the indictment:[3]

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[3] The indictment follows the statutory language closely. It charged that appellant (1) "did unlawfully by word of mouth,

"To advocate means to speak in favor of, defend by argument, to support, vindicate, or recommend publicly . . . "

"Political reform . . . refers to remodeling or changing the policy or the administration of government" (A. 77-78).

Concerning assembly, the jury was instructed that "you must find beyond a reasonable doubt . . . [that] the defendant did unlawfully, voluntarily, assemble with a group or assemblage of persons formed to advocate criminal syndicalism"[4] (A. 79).

As so adopted, the instructions of the trial court are to be read as if their precise words had been written into the statute, *Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949); *Cramp* v. *Board of Public Instructors,* 368 U. S. 278, 285 (1961); *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 688 (1959); *Hebert* v. *Louisiana,* 272 U. S. 312, 317 (1926); *Winters* v. *New York,* 333 U. S. 507, 514 (1948). The instructions are the final and authoritative construction of

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advocate the necessity or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform" and (2) "did unlawfully, voluntarily, assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism."

The instruction nowhere indicated that the term "unlawfully" before "assembly" in the indictment had an operative meaning, as for instance, creating a distinction between "lawful" and "unlawful" assembly. The term was in fact redundant because ¶2923.13 does not use the term "unlawfully" in describing the prohibited assembly.

[4] "As used in paragraphs 2923.13 to 2923.15 inclusive, of the Revised Code, 'criminal syndicalism' is the doctrine which advocates crime, sabotage, which is defined as the malicious injury or destruction of the propriety of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform." Ohio Revised Code ¶2923.12.

§2923.13 by the State of Ohio and are of course binding on this Court.[5]

Aside from the instructions of the trial court in this case, the Criminal Syndicalism Act has been considered in only one previous case, *State* v. *Kassey,* 126 O. S. 177 (1932). There the Ohio Supreme Court explicitly rejected the applicability of the Federal Constitution, 126 O. S. at 184, notwithstanding the earlier decision in *Gitlow* v. *New York,* 268 U. S. 652 (1925). Reading the Ohio Criminal Syndicalism Act solely in the light of the Ohio Bill of Rights,[6] the court found the statute constitutional. Nevertheless the court conceded the broad scope of the Act, finding that it prohibited advocacy and teaching of the "propriety of violence and terrorism as a means of compelling others to agree with one's sentiments." 126 O. S. at 185-86. Under this interpretation the court had no doubt that "those who promoted the Declaration of Independence could have been punished under such a statute as we have under consideration . . ." *Id.* at 190.

While Ohio has a legitimate interest in the prohibition of sabotage, violence, or unlawful methods of terrorism,

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[5] It is interesting to note that in the several cases where similar state criminal syndicalism or related statutes were challenged in federal court, the states urged abstention so that their courts could construe their statutes. See e.g., *Ware* v. *Nichols,* 266 F. Supp. 564 (N. D. Miss., 1967); *Harris* v. *Younger,* 281 F. Supp. 507 (C. D. Calif., 1968); *Baser* v. *Binder,* —— F. Supp. —— (W. D. Ky. Civ. Action No. 5648, decided Oct. 13, 1967). In the present case, Ohio, without any federal interference, had an excellent opportunity to construe narrowly and perhaps constitutionally her broad criminal syndicalism Act. Instead, Ohio chose to affirm the conviction without benefit of explanation or written opinion.

[6] The court acknowledged that the free speech scope of the First Amendment of the Federal Constitution was broader than the comparable section of the Ohio Bill of Rights. 126 O. S. 177, 184, 187 (1932).

it may not promote these interests in a manner that does violence to the First and Fourteenth Amendments. See *United States* v. *Robel,* 389 U. S. 258, 268 n. 20 (1967). Here Ohio has not fulfilled its constitutional responsibility. Both the literal wording of the Ohio Criminal Syndicalism Act and the construction of these words by the trial court prohibit mere advocacy, and both fail to draw the necessary constitutional distinction between "advocacy of abstract doctrine and advocacy directed at promoting unlawful action." *Yates* v. *United States,* 354 U. S. 298, 318 (1957).

This distinction is fundamental. In numerous cases this Court has held that a prohibition that is so vaguely worded as to include both types of advocacy is invalid under the First Amendment. E.g., *Herndon* v. *Lowry,* 301 U. S. 242 (1937); *Yates* v. *United States,* 354 U. S. 298 (1957); *Noto* v. *United States,* 367 U. S. 290 (1961). As this Court said in the *Noto* case, "the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Noto* v. *United States, supra,* 367 U. S. at 297-298. A more immediate precedent is *Bond* v. *Floyd,* 385 U. S. 116 (1966), where the Court upheld the right of a Georgia legislator-elect to express his "sympathy and support" for the young men "who are unwilling to respond to a meritless draft." The Chief Justice, writing for a unanimous Court, said that the statement

> ". . . does not demonstrate any incitement to violation of law. No useful purpose would be served by discussing the many decisions of this Court which establish that Bond could not have been convicted for these statements consistently with the First Amendment. See,

e.g., Wood v. Georgia, 370 U. S. (1962); Yates v. United States, 354 U. S. 298 (1957); Terminiello v. Chicago, 337 U. S. 1 (1949)." 385 U. S. at 134.

There is no need to recount at length the important policies that underlie the distinction between abstract advocacy and advocacy directly promoting unlawful action. Suffice it to say that the First Amendment was designed to permit the broadest interchange of ideas, including ideas that are odious because ". . . the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men.'" *Marsh* v. *Alabama,* 326 U. S. 501, 509 (1946). The special interest in free discussion in a democracy has long been recognized by this Court as fundamental to our system of government because "[t]he right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949). Free expression is "of transcendent value to all society, and not merely to those exercising their rights." *Dombrowski* v. *Pfister,* 380 U. S. 479, 486 (1965). The government's interest in free discussion is not only based on tested principles, but it is a practical necessity in governing a democratic society since "it is only through debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." *Terminiello* v. *Chicago, supra,* 337 U. S. at 4.

The above analysis is applicable to the first clause of ¶2923.13 under which appellant was indicted. The other clause of the statute is also invalid because it prohibits all forms of voluntary assembly with "persons formed to teach or advocate the doctrine of criminal syndicalism." The trial court determined that the words spoke for themselves

and it gave no aid to the jury in applying the terms "unlawful voluntary assembly" (A. 78-79).

Assembly is specifically included within the protection of the First Amendment, and peaceful assembly has long been recognized as a protected right. See, e.g., *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); *Cox* v. *Louisiana*, 379 U. S. 536 (1965). In a long line of cases dealing with attempted prohibitions of or punishments for membership in disfavored organizations, this Court has recognized that "[a] law which applies to membership without 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms." *Elfbrandt* v. *Russell*, 384 U. S. 11, 19 (1966). See also *Keyishian* v. *Bd. of Regents*, 385 U. S. 589, 607-08 (1967). Lack of a requirement of specific intent was fatal in *Aptheker* v. *Sec. of State*, 378 U. S. 500 (1964) and *United States* v. *Robel*, 389 U. S. 258 (1967). Just as "guilt by association," *Schneiderman* v. *United States*, 320 U. S. 118, 136 (1943), has no place in the area of regulation of membership in organizations, some of whose aims are criminal, neither does it have any legitimate place in the area of assembly with such groups.

Indeed, assembly deserves greater protection than membership because the latter may imply agreement with some of the aims or objectives of an organization, while assembly carries with it no such implication. One may assemble for many reasons, such as to learn of the aims and doctrines of a group, without espousing those aims.

The statutory prohibition of free assembly reaches to the core of our democratic system. As this Court said in an early case, "The very idea of a government republican in form, implies a right on the part of its citizens to meet

peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States* v. *Cruikshank,* 92 U. S. 542, 552 (1875).

Ohio has chosen to draw its Criminal Syndicalism Act in broad and sweeping terms and the Ohio Supreme Court has affirmed instructions that construe the statute as all-encompassing in its destruction of the rights of speech and assembly, disregarding not only the requirement of narrow and strict draftsmanship in this sensitive area, see *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Winters* v. *New York,* 333 U. S. 507 (1948); *NAACP* v. *Button,* 371 U. S. 415, 433 (1963); *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), but also the central meaning of the First Amendment, "that the censorial power is in the people over the Government, and not in the Government over the people." *New York Times* v. *Sullivan,* 376 U. S. 254, 275 (1964).

II.

Paragraph 2923.13 is invalid under the First and Fourteenth Amendments because of its vagueness and overbreadth.

In addition to its prohibition against abstract advocacy and innocent assembly, ¶2923.13 is also vague and overbroad both in its provisions against speech and in its other provisions. Indeed, ¶2923.13 is the archetype of the vague statute indiscriminately intruding in the First Amendment area and relying on an area of legitimate concern to a state —the prohibition of violence, sabotage and terrorism—to justify suppression of speech, press and assembly.

The Ohio Criminal Syndicalism Act is an attempt to broadly proscribe activities explicitly protected by the First

Amendment—speaking, writing, printing, assembling. The terms in which ¶2923.13 seeks to regulate this behavior are strikingly similar to those of many loyalty oaths which this Court has struck down because they have been so vague as to proscribe "guiltless knowing behavior", *Cramp* v. *Board of Public Instruction, supra,* 368 U. S. at 286. See also *Baggett* v. *Bullitt,* 377 U. S. 360 (1964); *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Whitehall* v. *Elkins,* 389 U. S. 54 (1967).

Particularly pertinent is *Keyishian* v. *Bd. of Regents, supra,* where this Court examined a statutory scheme ostensibly designed to protect New York's educational system from subversion. That scheme prohibited persons found to have engaged in certain activities from teaching. This Court ruled that the statutes setting out the prohibited activities were so vague as to be invalid under the First Amendment.

Mr. Justice Brennan's discussion of the statutes in *Keyishian* is particularly relevant to the consideration of ¶2923.13 because the terminology in section 3021 of the New York Education Law, section 105 of the New York Civil Service Law, and sections 160-61 of the old New York Penal Law closely parallel the Ohio Code under attack here.

The Ohio Syndicalism Act, unlike the statutory scheme in *Keyishian* and the other oath cases, is a criminal statute. But in *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), it was plainly pointed out that this difference is not of constitutional dimension. "Where, as here, protected freedoms of expression and association are similarly involved, we see no controlling distinction in the fact that the definition

is used to provide a standard of criminality rather than the contents of a test oath." 380 U. S. at 494.

The Court could have added, of course, that a criminal statute, such as the one involved in this case, casts a deeper pall on First Amendment rights because the imprisonment and fine flowing from a conviction represents a certain and severe sanction that is sometimes lacking in oath cases. Consequently, the effect and constitutional infirmity of ¶2923.13 is at least as great as the parallel provisions of the New York law already invalidated in the *Keyishian* case. A clause by clause analysis of the two statutes makes this clear.

One of the clauses that formed the basis of the indictment in this case makes it a crime to "voluntarily assemble with any society . . . to teach or advocate the doctrines of criminal syndicalism." In holding that portion of the New York Civil Service Law §105(1)(a) invalid which barred the appointment of anyone who "wilfully and deliberately advocates" violent overthrow, the Supreme Court said:

> "This provision is plainly susceptible of sweeping and improper application. It may well prohibit the employment of one who merely advocates the doctrine in the abstract without an attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims . . . And in prohibiting 'advising' the 'doctrine' of unlawful overthrow does the statute prohibit mere 'advising' of the existence of the doctrine or advising another to support the doctrine? Since 'advocacy' . . . is separately prohibited, need the person 'teaching' or 'advising' this doctrine himself 'advocate it'? Does the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition?" 385 U. S. at 599-600.

The very same may be said of ¶2923.13.

Another clause of ¶2923.13 reads in part: "No person shall . . . publicly display any book . . . containing or advocating [criminal syndicalism]." Of a similar provision in section 161 of the old New York Penal Law, Mr. Justice Brennan asked, "Does the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy?" 385 U. S. at 599.

The same question may be asked about ¶2923.13.

¶2923.13 also decrees that "No person shall . . . print, publish, edit, issue, or knowingly circulate, sell, distribute, or publicly display any book, paper, document, or written matter in any form, containing or advocating, advising, or teaching . . . [criminal syndicalism]." Mr. Justice Brennan asked of a similarly worded subsection of the New York Civil Service Law,[7] "Does the prohibition of distribution of matter 'containing' the doctrine bar histories of the evolution of Marxist doctrine or tracing the background of the French, American, or Russian revolution?" 385 U. S. at 600-01.

The Ohio Criminal Syndicalism law is equally subject to the charge of undue vagueness and overbreadth.

A fourth clause of ¶2923.13, and one of the two which formed the basis of the indictment here, provides that "No person shall by word of mouth or writing advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of

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[7] N. Y. C. S. L. §105(1)(a): "No person shall be appointed . . . who prints, publishes, edits, issues or sells any book, paper, document, or written or printed matter in any form containing or advocating, advising, or teaching . . . [violent overthrow]."

accomplishing industrial or political reform. . . ." What does it mean to say that there is a "duty, necessity and propriety" to engage in certain conduct? What kind of a "duty"? A "propriety" according to what norms? The undefined statutory language, not supplemented by any guidance from the Ohio courts, is surely an insufficient guide to citizens of that state.

These flaws so strongly condemned by this Court in *Keyishian* were also fatal in earlier loyalty oath cases. In *Cramp* v. *Bd. of Public Instruction, supra,* this Court invalidated a requirement that teachers and other state employees swear that they never lent their "aid, support, advise, counsel or influence to the Communist Party" because it was lacking in "terms susceptible of objective measurement." 368 U. S. at 286. In *Baggett* v. *Bullitt, supra,* this Court struck down loyalty oaths required by the state of Washington of its employees because the oaths were likewise susceptible of such a broad reading as to leave conscientious persons in doubt of what in fact was proscribed. And in *Elfbrandt* v. *Russell, supra,* an Arizona statute requiring a loyalty oath of state employees was held unconstitutional. The statutes in *Baggett* and *Cramp* were unconstitutionally vague because the oaths in question could be read as proscribing such innocent behavior as giving legal advice to the Communist Party. In *Elfbrandt* the oath proscribed innocent conduct, such as membership in an organization with an unlawful purpose without subscribing to that purpose.

The Ohio Criminal Syndicalism Act contains the same fatal defects. Besides those portions of ¶2923.13 that parallel comparable portions of the statute found void-for-vagueness in *Keyishian,* the Act prohibits membership in any group formed to teach or advocate the doctrine of

criminal syndicalism, without any indication as to the quality or purpose of that membership. The Act also prohibits anyone from voluntarily assembling with any group or assemblage of persons formed to teach or advocate the doctrine of criminal syndicalism. If these words do not flatly prohibit mere disinterested assembly to hear others expound their views, or even interested assembly with a desire to learn about certain doctrines, they certainly are so vague that one cannot know whether he endangers his personal freedom when he engages in such activities or indeed stops to listen to a street-corner speaker or watches a parade of dissidents pass by.

For the above reasons ¶2923.13 infringes the constitutional requirement that "the power to regulate must be so exercised as not . . . unduly to infringe the protected freedoms." *Cantwell* v. *Connecticut,* 310 U. S. 296, 304 (1940). This requirement has been reiterated by the Court on numerous occasions, along with the recognition that in the area of free expression it is especially necessary that statutory restrictions be narrowly and precisely drawn because "a man may the less be required to act at his peril here, because free dissemination of his ideas may be the loser." *Smith* v. *California,* 361 U. S. 147, 151 (1959). Accordingly, ¶2923.13 runs afoul of doctrine enunciated in a series of important decisions from *NAACP* v. *Button, supra,* through *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967); and *Zwickler* v. *Koota,* 389 U. S. 241 (1968), that statutes overbroad in the area of free speech are unconstitutional on their face because they create a "chilling effect upon the exercise of First Amendment rights." *Dombrowski* v. *Pfister, supra,* 380 U. S. at 487; see *NAACP* v. *Button, supra,* 371 U. S. at 432-433.

III.

Paragraph 2923.13 is unconstitutional as applied, because it punishes speech protected by the First and Fourteenth Amendments.

There is no question but that Ohio can prohibit such activities as sabotage, violence, crime, and unlawful methods of terrorism. But before Ohio may punish speech and assembly, which are protected by the Constitution, there must be a clear and present danger that the prohibited activities will bring about a punishable substantive evil. *Schenck* v. *United States,* 249 U. S. 47 (1919); *Abrams* v. *U. S.,* 250 U. S. 616 (1919); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Wood* v. *Georgia,* 370 U. S. 375 (1962).

In *Gitlow* v. *New York,* 268 U. S. 652 (1925), this Court affirmed, over the dissents of Justices Holmes and Brandeis, a conviction under the New York Criminal Anarchy statute. In so doing it applied a First Amendment test that permitted criminal conviction for speech alone that merely had a "tendency" to cause a substantive evil that the state had a right to prevent. A similar statute was upheld in *Whitney* v. *California,* 274 U. S. 357 (1927).

Though the decisions in *Gitlow* and *Whitney* have never been expressly overruled, the plurality opinion of Chief Justice Vinson in *Dennis* v. *United States,* 341 U. S. 494, 507 (1951) said: "Although no case subsequent to Whitney and Gitlow have expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined towards the Holmes-Brandeis rationale." The Chief Justice then quoted the restatement of that rationale in *American Communications Association* v. *Douds,* 338 U. S. 382, 412 (1950): "[The First] Amendment

requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantive evil will result therefrom."

The tests enunciated in the *Dennis* and *Douds* cases were criticized at the time in dissenting opinions in those cases and in scholarly articles for approving an unduly restrictive interpretation of the First Amendment, at the cost of freedom of expression and association in the United States.[8] Later cases have veered from the philosophy of the opinions in *Dennis* and *Douds*, see, e.g., *United States* v. *Robel*, 389 U. S. 258 (1967); and it is therefore likely that current First Amendment standards are more hospitable to free speech than the cases decided in the 1920s.

Even under the earlier test, however, the conviction in this case must be reversed, because there is no incitement in this case or any indication that the statements for which appellant has been convicted would imminently lead to violence.

In *Whitney* v. *California, supra*, 274 U. S. at 376, Justice Brandeis summed up the reasons for requiring imminent danger before expression can be aborted when he said that "advocacy of [law] violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is

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[8] See *American Communications Association* v. *Douds*, 338 U. S. 382, 445 (1950) (Black, J., dissenting); *Dennis* v. *United States*, 341 U. S. 494, 579 (1951) (Black, J., dissenting); *Id.* at 581 (Douglas, J., dissenting); Nathanson, The Communist Trial and the Clear-and-Present Danger Test, 63 Harv. L. Rev. 1167 (1950); Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193 (1952). See also the references contained in T. Emerson, D. Haber, and N. Dorsen, 1 POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, 126-129, 140-143, 155-157 (3d ed. 1967).

nothing to indicate that the advocacy would be immediately acted on." See also *Dennis* v. *United States, supra,* 341 U. S. at 507, and *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 689 (1959), quoting this language with approval.

The point of Justice Brandeis's language is simple and basic. In the absence of a constitutional rule absolutely forbidding the abridgement of free speech, it is essential, if the profound values underlying an open society are to be preserved, to protect opinions that are not intimately connected with illegal conduct; or as Justice Holmes put it, "so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Abrams* v. *United States, supra,* 250 U. S. at 630 (dissenting opinion).

The absence of any imminent danger—or indeed of any danger at all—from the speech for which appellant was convicted is evident from an inspection of the record. The critical words were spoken at a meeting apparently staged for television, filmed upon the request of an anonymous caller (A. 8, 12), and with the consent and cooperation of the persons participating (A. 12). Two sequences were recorded. The first sequence, filmed outdoors on private property (A. 17, 18), depicted ten to twenty hooded figures, an undetermined number of whom appeared to be armed, gathered around a large wooden cross which was ignited during the film, an act of symbolic significance. During this sequence voices unidentified either in the film or elsewhere in the record offered a series of fragmentary and largely incoherent phrases and political slogans which in part were derogatory of Negroes and Jews (A. 17, 18). A call was made in this segment for a march on Congress and then on Florida and Mississippi (A. 18). In this call,

the only reference that could even possibly be considered an allusion to violence contained a *disclaimer* of revenge: "We're not a revengent (sic) organization, but if our president, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengence taken" (A. 18).

There was no indication that the "revengence" mentioned here in the context of a political discussion was not the usual political revenge normally pursued peacefully.[9] The State offered no evidence to contradict the disclaimer of violence or to indicate that the speaker intended his remarks to mean anything other than use of the political process. Still less is there any evidence that this "revengence" was to take place imminently or immediately, as the test approved by the Supreme Court in *Dennis* and *Douds* would require.

It is true of course that in *Dennis* Chief Justice Vinson said it was sufficient, in light of the nature of the conspiracy found to exist within the Communist Party, for the government to prove that violent overthrow would take place "as speedily as circumstances would permit." But in the paragraph following, this Court said:

> "The situation with which Justices Holmes and Brandeis were concerned in Gitlow was a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community . . . They were not confronted with any

[9] See deposition of James R. Venable, attorney and Imperial Wizard of the National Knights of the Ku Klux Klan Association of America, as to non-violent nature of the Klan. R. 157. For other testimony on the philosophy of the Klan and its organizational restrictions against violence. See R. 137, 1830-84.

situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis." 341 U. S. at 510.

What we have here is similar to what Justices Holmes and Brandeis were confronted with in *Gitlow*—"a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community." Certainly the Ohio Ku Klux Klan does not embody "an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after world crisis"—or anything even close to it.

To uphold the conviction here would be to turn away from the constitutional precepts enunciated by Justices Holmes and Brandeis and specifically approved in *Dennis* and other cases. There is no warrant for doing so on this record.

The facts show that throughout the talk given by a man in a red hood, later identified as appellant, there was no indication of any crowds having gathered or of there being any onlookers other than the participants in the meeting. Even if there had been, that would not have justified the arrest of appellant—the presence of "muttering and grumbling onlookers" was held an insufficient reason to brook peaceful exercise of First Amendment rights in *Cox* v. *Louisiana*, 379 U. S. 536, 543 (1965). Nor was there any indication of any disturbance or a call for violence such as the Court condemned in *Feiner* v. *New York*, 340 U. S. 316 (1950). Furthermore, the rally took place away from populated areas and on private property where there could be "no actual interference with traffic" and no threat of "disturbance of the community", *Edwards* v. *South Carolina*, 372 U. S. 229, 239 (1963).

The second segment of film took place indoors, showing six hooded figures, some armed, and an unarmed figure in a red hood. He made a similar statement to the one made outdoors, but omitting any reference on this occasion to "revengence". Here too the announcement was nothing more than a political statement.

The State offered in evidence only the two filmed sequences (A. 17-18, 24), certain objects appearing in the film (A. 51), identification testimony (A. 43, R. 107), and testimony as to the location of the meeting (A. 9). Other than the words spoken in the films, the State offered no evidence whatever as to the aims and intentions of the speaker, the group depicted in the film, or the Ku Klux Klan itself. There was no attempt made by the state to show the presence of a clear and present danger, or indeed of any danger whatsoever.

For these reasons it is plain that the Ohio courts applied ¶2923.13 to the appellant in violation of his rights of free expression protected by the First and Fourteenth Amendments.

This conclusion is buttressed by the trial judge's instructions to the jury, which specifically permitted a verdict of guilty without a finding of any imminent danger to the community or of violent conduct by any individual, in short without a finding of a "clear and present danger" of any kind. Inspection of the relevant portions of the charge, which are set out at A. 78-79, reveals that there was simply no allusion to the necessity of proving imminent danger as a result of appellant's remarks. Accordingly, the jury could—and no doubt did—find appellant guilty without reference to any possible unlawful activity on his

part. In light of this charge it is all the more clear that the conviction here involves a constitutionally impermissible application of ¶2923.13 and must be reversed.

IV.

Paragraph 2923.13, which indiscriminately prohibits criminal syndicalism directed against the United States and the State of Ohio, is preempted by federal legislation.[10]

Pennsylvania v. *Nelson,* 350 U. S. 497 (1956), established that the Smith Act, 10 U. S. C. §2385, which was passed to protect the United States from subversion and sedition, excluded state legislation directed to the same goal. Subsequently, in *Uphaus* v. *Wyman,* 360 U. S. 72 (1959), the Court limited *Nelson* by ruling that a state investigative body could validly inquire into possible violations of the New Hampshire Subversive Activities Act, which was designed to protect the security of the state as distinguished from the federal government. See also *DeGregory* v. *New Hampshire Attorney General,* 383 U. S. 825, 827 n. 2 (1966).

Under these decisions the conviction in this case is invalid because ¶2923.13 is preempted by federal legislation, including the Smith Act, the more recently enacted Internal Security Act of 1950, 50 U. S. C. §781 *et seq.*, and the Communist Control Act of 1954, 50 U. S. C. §841. This is so

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[10] This issue, though not raised in the jurisdictional statement, may be considered by the Court, which has the power to notice a plain error not assigned. Rule 40(1)(d)(2); *Brotherhood of Carpenters* v *U. S.*, 330 U. S. 395, 412, and authorities there cited; *Silber* v. *United States,* 370 U. S. 717 (1962); cf. *Terminiello* v. *Chicago,* 337 U. S. 1, 7-12 (1949). The question was raised in the state trial and appellate courts.

because the Ohio statute is not limited in its terms to possible violence or overthrow of the state government, but is directed against such activities in relation to the United States government, and therefore provides no basis for concluding that it is confined to its only permissible objective—protection of the state against attempts to subvert it through violent means.

Nor does the indictment or the instructions to the jury cure the deficiency. The indictment, in two counts, assiduously follows the language of the statute. It is true that each count ends with the language "contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio." But this is *merely a formal* expression of the fact that Ohio is the sovereign bringing the charge, and such a formality is obviously insufficient to narrow the substantive scope of the indictment.

The relevant instructions to the jury are equally unavailing to the state. They were merely that "Political reform . . . refers to remodeling or changing the policy or administration of government" (A. 78). At no point is the jury advised of the critical distinction between "political reform" of the federal government and such reform of state and local governments.

The only action mentioned, a march on Congress and then Florida and Mississippi (A. 18) would take place far from Ohio. It is therefore impossible to tell whether the jury was concerned only with the danger posed by appellant's speech and voluntary assembly in Ohio or whether they took their task, in the absence of limiting instructions, to be that of surveying the danger posed to all organized forms of government.

Certainly the state should carry the burden of clarifying its legislation so to make certain that the strong policies underlying the *Nelson* decision are not infringed. These policies, it will be recalled, included the undesirability of state intrusion in a field where the federal concern is dominant—protection of the United States government against violent overthrow—and avoidance of the serious risk of conflict between state enforcement and the administration of the federal program.

The dangers foreseen in *Nelson* are evident here. All relevant federal legislation is still applicable, and with it the predominant federal interest in protecting the United States against the prohibited activity. Furthermore, because appellant is presumably subject to indictment for the very acts which are the subject of this prosecution, multiple punishments for the same acts are possible. Yet this is flatly inconsistent with the *Nelson* rationale. There it was said: "Without compelling indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment." 350 U. S. at 509-510.

Finally, it is important to note that in all these respects the prosecution here differs from the investigation upheld in *Uphaus* v. *Wyman, supra.* In that case the inquiry was directed to the security of New Hampshire, which this Court was not prepared to hold beyond the reach of the state government. No double prosecution was possible; indeed, because the matter was still at the investigative stage, there was real doubt as to whether there would ever be a single prosecution for the prohibited acts.

Accordingly, whatever the vitality or persuasiveness of the *Uphaus* distinction of the *Nelson* case, the very difference relied on there works in favor of the appellant here,

who is being criminally proceeded against under a state statute which reaches broadly into areas that are the exclusive domain of the federal government. For this reason ¶2923.13 is preempted by federal law, and prosecutions under it are invalid.[11]

V.

Appellant was denied the due process of law in that his conviction was supported by no evidence whatever.

In the absence of any evidence whatever to support a conviction, a person who is nevertheless found guilty and convicted is denied due process of law. *Thompson* v. *Louisville,* 362 U. S. 199 (1960); *Garner* v. *Louisiana,* 368 U. S. 157 (1961); *Barr* v. *City of Columbia,* 378 U. S. 146 (1964); *Johnson* v. *Florida,* 391 U. S. 596 (1968).

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[11] The applicability of the *Nelson* case to this prosecution should be viewed, moreover, in the light of current realities. In the context of the present political situation, it is inconceivable that advocacy of overthrow of government by force and violence could be limited to state and local governments. In an earlier day this might have been the case, see *Luther* v. *Borden,* 7 How. (48 U. S.) 1 (1849). But today, revolutionary movements seek overthrow of all existing government. As such, all sedition is, in effect, a "crime against the *Nation.*" *Pennsylvania* v. *Nelson, supra,* 350 U. S. at 505, quoting with approval the Court below (emphasis in original).

State and local governments would be incidental targets of any who wished to take over the country. The overthrow of state government is a necessary by-product of the overthrow of the federal government. But if the states can continue to prohibit such activity and prosecute those who criminally advocate it, a danger of the same kind and one equal in magnitude to that noted in the *Nelson* case would arise. A state could prosecute acts prohibited by the Smith Act simply by skillfully drafting its indictments. In short, if every act made criminal under federal legislation is also a crime against each state, the rule of preemption would be reduced to a mere matter of pleading and a race to the courthouse door.

Under the terms of ¶2123.13 and the indictments in this case, Ohio had the burden of showing advocacy, assembly, and organization to propagate criminal syndicalism.[12] It is plain that the state altogether failed in meeting its burden, and appellant's conviction is therefore invalid.

The state chose to rest on the film and supplemental identification testimony. Yet neither the film nor transcript contain a scintilla of evidence of advocacy of reform through violence that would have satisfied count one. The evidence, as we have shown, is to the contrary. Nor did the state attempt to satisfy that part of ¶2923.13 prohibiting voluntary assemblage with such a group, for it offered no proof of the purpose of the group assembled or of the Klan, as required to meet count two.

In *Fiske* v. *Kansas*, 274 U. S. 380 (1927), this Court invalidated a conviction under the Kansas Criminal Syndicalism Act containing language paralleling the Ohio statute at issue here. At trial, the only evidence offered of criminal syndicalism was the preamble of the organization's constitution advocating, *inter alia* that " 'between [the working class and the employing class] a struggle must go on until the workers of the world organize as a class, take possession of the earth, and the machinery of production and abolish the wage system' " 274 U. S. at 382-383. Moreover, in *DeJonge* v. *Oregon*, 299 U. S. 353 (1937), this Court said unanimously:

> "[C]onsistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime.

---

[12] The trial court gratuitously offered a charge on conspiracy in the absence of conspiracy language from the statute, the indictment, or as part of the state's proof. A. 79-80.

> The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." 299 U. S. at 365.

In *DeJonge* the Court also stated that it was no crime for a speaker to urge attendance at a "meeting of the [Communist] party . . . and to bring their friends to show their defiance of local police authority and to assist them in their revolutionary tactics." 299 U. S. at 359. Can it therefore be illegal today to announce a peaceful march on Congress and on two Southern states, or even to suggest that some unnamed revenge may follow if the government doesn't change, or to express dislike for certain minority groups in a derogatory manner? Whatever the generally held view of the Klan, the state is held to its proof, especially where the crime charged consists of words and alleged association. The prosecution failed altogether to meet the most minimal evidential standards.

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,

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No. 492

IN THE

Supreme Court of the United States

October Term, 1968

CLARENCE BRANDENBERG,
Appellant,

vs.

PEOPLE OF THE STATE OF OHIO,
Appellees.

BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

On Appeal from the Supreme Court of the State of Ohio

BRIEF OF AMICUS CURIAE

ISSUES PRESENTED

I.

Section 2923.13, Ohio Revised Code Is Not Unconstitutional, Either On Its Face Or As Applied In This Case.

II.

Section 2923.13, Ohio Revised Code Prohibiting Criminal Syndicalism Has Not Been Preempted By Federal Legislation.

STATEMENT OF THE CASE

This amicus curiae brief is submitted at the request of the Court.

The Attorney General of Ohio took no part in the indictment or trial of appellant in this case and is completely unfamiliar with the facts and circumstances thereof other than as they appear in the record filed in this Court. This record appears to support the statement submitted by appellant in his brief. In addition to this statement, it is deemed pertinent to note that the record shows that the announcer-reporter who testified that he had received a telephone invitation from an unknown party to appear at the subject rally (A.8, 12) testified that he subsequently recognized the voice of appellant as the same as that of the person who had invited him to the rally and also the same as that of the person who wore the red hood at the rally (A.12-15, 19, 25-26).

It further is noted that the record which purports to contain the trial judge's charge to the jury, contains no requests of appellant's counsel for additional or clarifying instructions or any objection to those which were given. Certainly a denial of such requests should have been the subject of a motion for a new trial but appear not to have been (A.5-6).

The Attorney General of Ohio confines his brief to the questions of the constitutionality of the subject statute and preemption by the United States through the Smith Act.

ARGUMENT

I.

Section 2923.13, Ohio Revised Code Is Not Unconstitutional, Either On Its Face Or As Applied In This Case.

Section 2923.13, Ohio Revised Code,[1] advocating criminal syndicalism, divided into sections reads as follows:

> 1. No person shall by word of mouth or writing advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.
>
> 2. No person shall print, publish, edit, issue, or knowingly circulate, sell, distribute, or publicly display any book, paper, document, or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence, or unlawful methods of terrorism.
>
> 3. No person shall openly, wilfully, or deliberately justify, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence, or unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism.
>
> 4. No person shall organize or help to organize or become a member of, or voluntarily assemble with any

---

[1] Ohio Revised Code 2923.13. *Advocating criminal syndicalism.*

No person shall by word of mouth or writing advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform; or print, publish, edit, issue, or knowingly circulate, sell, distribute, or publicly display any book, paper, document, or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence, or unlawful methods of terrorism; or openly, willfully, or deliberately justify, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence, or unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or organize or help to organize or become a member of, or voluntarily assemble with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.

society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

Only two sections of the statute are applicable in this case.

The pertinent part of count one of the indictment provides: ". . . did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform . . ." The pertinent part of the second count of the indictment provides: ". . . did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism [a doctrine which advocates crime; sabotage, which is defined as malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform] . . ." Specifically, these counts of the indictment fall within the scope of parts (1) and (4) of the statute.

Section 2923.12, Ohio Revised Code[2] defines Criminal Syndicalism, ". . . 'criminal syndicalism' is the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform." There can be no question concerning the intent of the Ohio Legislature in the type of activity that was proscribed in accomplishing any industrial or political reform, and this section by direct reference, applies the definition of criminal syndicalism to Section 2923.13, the section under which appellant was charged. There is no vagueness, therefore, in the descrip-

---

[2] Ohio Revised Code 2923.12. *Criminal Syndicalism.*

As used in Sections 2923.13 to 2923.15 inclusive, of the Revised Code, "criminal syndicalism" is the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform.

tion of the acts proscribed by the legislature.

The intention of the legislature in enacting these sections was not to interfere with the teaching or advocacy of accomplishing industrial or political reform but rather to insure that such reform could not be accomplished through the advocacy or teaching the duty of the necessity or propriety of crime, sabotage, violence, or unlawful methods of terrorism.

Certainly a state legislature has the right to enact legislation which will prevent the use of violence, commission of crime, sabotage, and unlawful methods of terrorism in bringing about either political or industrial reform. Mr. Chief Justice Vinson, speaking for the majority of the Court, in referring to the Smith Act, 18 U.S.C., Section 10, stated:

> "The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. That it is within the *power* of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion . . . No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the government by force and violence. The question with which we are concerned here is not whether Congress has such *power,* but whether the *means* which it has employed conflict with the First and Fifth Amendments to the Constitution." *Dennis v. United States,* 341 U.S. 494, 501 (1951).

In Dennis the sub-sections under consideration were not greatly different in their application from those of Section 2923.13 Ohio Revised Code. In Dennis, the proscribed acts dealt with the overthrow or destruction of any government in the United States by force or violence or with the intent to cause such overthrow, to advocate or teach the duty, necessity, desirability or propriety of force or violence.

Subsection 3, paragraph 10 of the Smith Act is almost identical with part (4) of the Ohio Act except that the Ohio Act bars the unlawful acts in accomplishing political or industrial reform rather than the overthrow or destruction of government.

Appellant contends that Section 2923.13 Ohio Revised Code, violates the First and Fourteenth Amendments to the Constitution of the United States. He bases this argument on the fact that the liberal wording of the Ohio Criminal Syndicalism Act fails to draw the necessary constitutional distinction between "advocacy of abstract doctrine and advocacy directed at promoting unlawful action."

In the Ohio statute there is no wording by which the advocacy or teaching of an abstract doctrine could be implied. The statute, as applied to the indictment herein, only can be construed in one way, namely that of advocating (or teaching) the duty, the necessity, the propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform. The very language used here negates the interpretation which appellant would have placed upon the statute. This wording is directed at taking action, not discussion, as appellant would have us believe.

And even as charged by the trial court no such construction could be implied. The charge of the court must be taken in its entirety, not by definitions taken out of context, in explaining the meaning of the terminology contained in the elements of the first count of the indictment.

> "To advocate means to speak in favor of; defend by argument; to support, vindicate, or recommend publicly.
>
> "Unlawful method of terrorism is the use of terror and violence to intimidate, to subjugate, etc., when the methods used to accomplish such intimidation or subjugation are against the law.

"Political reform as used in Ohio law refers to remodeling or changing the policy or the administration of government.

"Violence is the unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury.

"Crime is a violation of, or a neglect to perform, a legal duty of such importance to the protection of society that the state takes notice thereof and imposes a penalty or punishment for such violation or neglect. In Ohio, no act is a crime unless specifically defined by the legislature and a penalty provided for the violation thereof." (A 77-78).

Thus, the meaning of advocacy, as defined by the court, is that to advocate means to speak in favor of or to defend by argument or to support, vindicate or recommend publicly the use of terror and violence to intimidate, subjugate, etc., when the methods to accomplish such intimidation or subjugation are against the law. There is nothing in this definition that proscribes the pursuit of peaceful studies and discussions or teaching in the realm of ideas. The Ohio legislature has a legitimate interest in the prohibition of sabotage, violence, or unlawful methods of terrorism and its meaning is clear. It had no intention of eliminating the mere abstract teaching of the moral propriety or even the moral necessity for a resort to force or violence but *only teaching the duty to resort thereto.* The part of the statute prohibiting the assembly certainly is no broader in coverage than Section 2, (3) of the Smith Act which in *Dennis v. United States, supra,* was found constitutionally sound.

Appellee has no argument with the findings of this count in *Yates v. United States,* 354 U.S. 298, (1957), cited by appellant. These petitioners requested an instruction concerning the advocacy of abstract doctrine. This Court reaffirmed and clarified the decision in *Dennis.* In that decision the Court likened the Smith Act to *Gitlow v. New York,* 268 U.S. 652, (1925), and the New York Criminal Anarchy

Act upon which the Smith Act was patterned. In *Yates,* the Court, quoting from *Gitlow,* said at page 318:

> "The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. . . . It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. . . . This [Manifesto] . . . is [in] the language of direct incitement. . . . That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of by force, violence and unlawful means, but action to that end, is clear. . . . That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear." Id. 268 US at 664-669. *Yates* 1, L. Ed. 2d, p. 1375.

The Court then concluded in *Yates* that the Smith Act was aimed at the advocacy and teaching of concrete action for the forcible overthrow of government, and not of principles divorced from action. The Smith Act was found to be constitutional; the case was reversed and remanded because of an error in a refusal to charge and lack of evidence.

The constitutionality of the Smith Act again was upheld in *Scales v. United States,* 367 U.S. 203, 228 (1961), particularly as it applied to the First Amendment. Then in a companion case, *Noto v. United States,* 367 U.S. 290 (1961), cited by appellant, the Court reversed on the ground that the evidence adduced at the trial was insufficient to sustain the conviction. And in *Bond v. Floyd,* 385 U.S. 116 (1966), the unanimous decision of this Court was based upon the fact that Bond's statements failed to demonstrate any incitement to violations of law.

Nor can that portion of the statute, part 4, dealing with assembly be attacked on the grounds of vagueness.

As said by this Court in *United States v. Cruickshank*, 92 U.S. 542, 522 (1875), cited by appellant: "The very idea of a government republican in form, implies a right on the part of its citizens to *meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.*" (Emphasis added).

The portion of the section applicable reads:

> "[no person shall] organize or help to organize or become a member of, or *voluntarily assemble with* any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism [the doctrine which advocates crime; sabotage; which is defined as the malicious injury or destruction of property of another; violence; or unlawful methods of terrorism as a means of accomplishing . . . political reform.]" (Emphasis added).

This description hardly can be described as one proscribing the right of any of the citizens of Ohio from meeting peaceably for any purpose.

Appellee believes that, except for the rearrangement of words, this section is identical with that of Section 2 (3) of the Smith Act with one significant difference. The Ohio statute provides that a violator must "voluntarily assemble with" whereas the Smith Act does not. Of course, the ultimate object of the assembly proscribed by the Smith Act is the overthrow or destruction of any government in the United States by force whereas that of the state statute is the accomplishment of political or industrial reform.

This section of the Smith Act has been found to be constitutional in *Dennis v. United States, supra; Yates v. United States, supra;* and *Scales v. United States, supra.* To be sure many convictions under the Smith Act have been reversed for the reason that an instruction to the jury was not sufficient as in *Yates,* or for the lack of an allegation and proof of specific interest as in *Noto.* And it may be

argued by appellant that the indictment here was not adequate to allege an intent but the indictment did allege that he "did unlawfully voluntarily assemble with a group or assemblage of persons found to advocate the doctrines of criminal syndicalism" (A. 2) which certainly indicates an intent upon his part, and the fact that he was the leader of the group assembled (A. 25-26) is indicative that he was not present as an innocent bystander.

The motion to quash the indictment was general in form and attacked the indictment on the basis that the statute upon which it was based was unconstitutional and further that the statute had been superseded by the Smith Act (A. 3). No clarification of the counts of the indictment nor request for a bill of particulars appear to have been made and denied. Nor was such a denial made the subject of a motion for a new trial (A. 5-6) as it should have been, if applicable.

Appellee, after considerable research finds only one other statute similar to the Ohio Criminal Syndicalism Statute here under attack. That is California's Criminal Syndicalism Act; Sections 11400 and 11401 California Penal Code. It is noted that subsections 1 and 4 of the California Act are practically identical to the subsections of the Ohio statute under attack. As in the Ohio statute, the California law prohibits certain acts as a means of accomplishing industrial or political change. The California Act was upheld in this Court, as not being repugnant to the First and Fourteenth Amendments to the Constitution in *Whitney v. California,* 274 U.S. 357 (1927). This Court held that the act was not unduly vague and uncertain as to its application. At page 368, the court stated:

> "It is clear that the Syndicalism Act is not repugnant to the due process clause by reason of vagueness and uncertainty of definition . . . The act, plainly, meets

the essential requirement of due process that a penal statute be 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties,' and be couched in terms that are not 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Similar expressions are common in the criminal statutes of other states. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. Nash v. United States, 229 U.S. 373, 377, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; Miller v. Strahl, 239 U.S. 426, 434, 60 L. ed. 364, 368, 36 Sup. Ct. Rep. 147. So, as applied here, the Syndicalism Act required of the defendant no 'prophetic' understanding of its meaning."

Then at page 371, it found:

"Nor is the Syndicalism Act as applied in this case repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association.

"That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. Gitlow v. New York, 268 U.S. 652, 666-668, 69 L. ed. 1138, 1145, 1146, 45 Sup. Ct. Rep. 625, and cases cited.

"By enacting the provisions of the Syndicalism Act the state has declared through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the state, that these

acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute (Mugler v. Kansas, 123 U.S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273), and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the state in the public interest (Great Northern R. Co. v. Clara City, 246 U.S. 434, 439, 62 L. ed. 817, 819, 38 Sup. Ct. Rep. 346).

"The essence of the offense denounced by the act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. See People v. Steelik, 187 Cal. 376, 203 Pac. 78. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear. We cannot hold that, as here applied, the act is an unreasonable or arbitrary exercise of the police power of the state, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the state.

"We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clause of the 14th Amendment, on any of the grounds upon which its validity has been here challenged."

Mr. Justice Brandeis with whom Mr. Justice Holmes joined in a concerning opinion stated at page 373:

"But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless

speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled."

Then at page 378, he continued:

"But it [legislative declaration] does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. As a statute, even if not void on its face, may be challenged because invalid as applied (Dahnke-Walker Mill Co. v. Bondurant, 257 U.S. 282, 66 L. ed. 239, 42 Sup. Ct. Rep. 106), the result of such an inquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the state, creates merely a rebuttable presumption that these conditions have been satisfied.

"Whether, in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the court that assembling with a political

party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the 14th Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the state court cannot be disturbed." 71 L. ed. U.S. 272-274.

As in *Whitney* apparently no contention was made in the trial court that the statute was void for the reason that there was no clear and present danger of serious evil, nor apparently did appellant contend at the trial that the existence of these conditions were necessary of proof thereby requiring the question of restricting the rights of free speech and assembly to be passed upon by the court or jury. As in *Whitney* there was evidence upon which the court or jury might have found that such danger existed.

This Court never has overruled by subsequent decision its decisions in *Dennis* or *Whitney* and none of the cases cited by appellant indicate that they have been overruled by implication.

The amicus has no argument with the decisions of this Court in the loyalty oath cases wherein the oaths required were so vague as to proscribe "guiltless knowing behavior" such as in *Cramp v. Board*, 368 U.S. 278 (1961), wherein the proscribed words were "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party." There is no guilty knowing behavior described or proscribed here. *Bagget v. Bullitt*, 377 U.S. 360 (1964) is an example of an oath that did not

provide an ascertainable standard of conduct or one requiring more than a State may command. *Elfbrand v. Russell,* 384 U.S. 11 (1966) held that the statute was void in that it did not require a showing that an employee was an active member with the specific intent of assisting in achieving the unlawful ends of the proscribed organization. *Whitehill v. Elkins,* 389 U.S. 54 (1967) is another example of an oath assuring that one was not a member of a subversive organization when in fact he might not know the purposes of all of the organizations to which he belonged. In *Keyishan v. Board of Regents,* 385 U.S. 589 (1967), statutes that required or authorized the removal of faculty members for seditious utterances were unconstitutionally vague because a teacher could not know the extent to which the utterance must transcend mere statement about abstract doctrines of governmental overthrow in the abstract, made membership in the Communist Party prima facie evidence of disqualification and did not permit proof of non-active membership or absence of interest to further unlawful aims. At page 607, this Court stated:

> "Elfbrand and Aptheker [also cited by appellant] state the governing standard: legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations."

It is significant that although the section of the laws invalidated in Keyishan were held invalid "insofar as they proscribe mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party" the New York Penal Laws, Section 160 and 161, although referred to in the decision, were left intact.

II.

Section 2923.13 Ohio Revised Code Prohibiting Criminal Syndicalism Has Not Been Preempted By Federal Legislation.

It is exceedingly difficult to understand appellant's contention that federal law has preempted Section 2923.13 Ohio Revised Code prohibiting criminal syndicalism.

In support of his contention appellant cites the case of *Pennsylvania v. Nelson,* 350 U.S. 497 (1956). A careful review of that case indicates that the basis for its holding is that in enacting the Smith Act, the Congress preempted the right to prosecute Sedition against the United States. Mr. Chief Justice Warren delivered the opinion of the Court and enunciated tests of supersession.

> "*First,* [the] scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' " Page 502.
>
> "*Second,* the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.' " Page 504.
>
> "*Third,* enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program." Page 505.

Under the first rule the Court found the Pennsylvania Sedition Act, which specifically proscribed the crime of sedition against the government of "this state or of the United States," to be invalid in that Congress had intended to occupy the field of sedition.

Under the second rule the Court implied that Congress has determined that sedition *against the United States* is not a local offense. It is an offense against the nation.

Under the third rule the Court observed that the Federal Government had urged the states not to intervene with sedition against the United States.

But Chief Justice also stated at page 500:

> "It should be said at the outset that the decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct. The distinction between the two situations was clearly recognized by the court below. Nor does it limit the jurisdiction of the States where the Constitution and Congress have specifically given them concurrent jurisdiction as was done under the Eighteenth Amendment and the Volstead Act. United States v. Lanza, 260 US 377, 67 L ed 314, 43 S Ct 141. Neither does it limit the right of the State to protect itself at any time against sabotage or attemped violence of all kinds."

An examinaion of the Ohio statute shows clearly that it does not offend any of the enunciated rules.

There is no reference to sedition, expressed or implied, in the Ohio Criminal Syndicalism Act which proscribes the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction or property of another; violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform. There is nothing in this proscription which faintly suggests any application against interference with the federal government as specifically was done in the Pennsylvania law. All of the federal acts upon which the decision in *Pennsylvania v. Nelson, supra,* was based were aimed at the overthrow of government in the United States. The Ohio law does not presume to intrude into this area other than that political reform, by implication might be construed to amount to a complete overthrow of government. No such construction can be placed upon such verbiage which more appropriately envisage riots in connection with political rallies, interference with elections, illegal strike procedures and the like. It hardly can be argued

that the Congress has preempted the right to prosecute such practices, nor is it conceivable that the Congress ever would interfere with the States in their effort to maintain law and order within their respective boundaries. And this Court has so held. In *Uphaus v. Wyman,* 360 U.S. 72, (1959) at page 76, the Court, in referring to its decision in *Pennsylvania v. Nelson, supra,* stated:

> "... In Nelson itself we said that the 'precise holding of the court ... is that the Smith Act ... which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*' (Italics supplied). 350 U.S. at 499. The basis of Nelson thus rejects the notion that it stripped the States of the right to protect themselves. All the opinion proscribed was a race between federal and state prosecutors to the courthouse door. The opinion made it clear that a State could proceed with prosecutions for sedition against the State itself; ... Nor did our opinion in Nelson hold that the Smith Act had proscribed state activity in protection of itself either from actual or threatened 'sabotage or attempted violence of all kinds.'" ...

In footnote 8 of the opinion it is pointed out:

> "... that the State had full power to deal with internal civil disturbances. Thus registration statutes, quo warranto proceedings as to subversive corporations, the subversive instigation of riots and a host of other subjects directly affecting the state security furnish grist for the State's legislative mill."

This is exactly what the Ohio Criminal Syndicalism Act was designed to do.

Nor can appellant contend that because the Ohio statute did not specifically limit its proscription to state activities it perforce included violations against the federal government. Section 1 of the New Hampshire Act, attacked in Uphaus, defines a subversive person: "'Subversive person'

means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches, by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of these, by force or violence; . . .' " Footnote 6. *Uphaus v. Wyman, supra.*

This negates completely appellant's argument that because Ohio specifically did not except offenses against the federal government, it was void. The New Hampshire Act which did include specifically such offenses, was not found to have been preempted in *Uphaus.*

CONCLUSION

Section 2923.13 Ohio Revised Code does not on its face or as authoritatively construed impose criminal sanctions in the exercise of the rights of free speech or peaceable assembly, is not vague or overbroad, nor has it been preempted by federal legislation. The amicus submits therefore that it is not unconstitutional.

Respectfully submitted,

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NO. 492

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

CLARENCE BRANDENBURG,
Appellant,

v.

STATE OF OHIO,
Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

OPINIONS BELOW

There are no written opinions, either reported or unreported, in this case.

JURISDICTION

This is an appeal from the final judgment of the Supreme Court of the State of Ohio entered June 12, 1968, dismissing the appeal from the Court of Appeals of the First Appellate District of Ohio dated February 16, 1968, affirming the judgment of conviction rendered in the Court of Common Pleas of Hamilton County, Ohio, on December 5, 1966. Probable jurisdiction was noted on November 18, 1968.

STATUTES INVOLVED

Ohio Revised Code Section 2923.13 — Advocating Criminal Syndicalism

> "No person shall by word of mouth or writing, advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform; or print, publish, edit, issue, or knowingly circulate, sell, distribute or publicly display any book, paper, document, or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or policital reform should be brought about by crime, sabotage, violence, or unlawful methods of terrorism; or openly, willfully, and deliberately justify, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence, or unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or organize or help to organize or become a member of, or voluntarily assemble with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.
>
> Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both."

Ohio Revised Code Section 2923.12 — Criminal Syndicalism

> "As used in sections 2923.13 to 2923.15, inclusive, of the Revised Code, 'criminal syndicalism' is the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform."

QUESTIONS PRESENTED

Counsel for the appellant has set forth four questions in this matter. However, it is our humble opinion that, in light of the arguments that counsel has set out relative to Question 1, that basically Question 1 and Question 2 are the same for the purpose of the Argument to this Court, and we will therefore join Questions 1 and 2 as presented by counsel in our response thereto. We therefore submit the following as being the questions involved in this case:

1. **Whether Ohio Revised Code Section 2923.13, prohibiting criminal syndicalism, violates the First and Fourteenth Amendments of the Constitution of the United States?**

2. **Whether Ohio Revised Code Section 2923.13, which prohibits criminal syndicalism directed against the State of Ohio, is pre-empted by Federal legislation?**

3. **Whether there was any evidence to sustain a conviction under Section 2923.13 of the Ohio Revised Code, as required by the due process clause of the Fourteenth Amendment?**

STATEMENT OF FACTS

In this case the defendant-appellant made pre-arrangements with a television reporter and television cameraman for their attendance at a Ku Klux Klan rally and meeting held in Hamilton County, Ohio, on June 18, 1964. The rally and meeting were to be recorded by them on sound film for re-broadcast. Subsequently the recording on the sound film was broadcast over both a local station as well as a network television station. When the cameraman and reporter arrived they were met by several hooded indi-

viduals, carrying guns. Among the items identified were a shot-gun, a rifle, and another weapon. The hooded individuals were wearing what appeared to be sheets, with holes at a point where the eyes were, to give visibility to the persons behind the sheets. (Appendix 9).

The leader of the group was identified at the trial as being the defendant-appellant in this matter. (Appendix 13, 14, 15, 19, 37, 40, 41, 43, 43, 44, 47).

The defendant-appellant at the time wore a red robe and hood and made the following statements at the rally:*

> "I would like to — how far is the nigger going to — yeah. Over there. This is what we are going to do to the niggers. I would like to ask — call this — Patrick. A dirty nigger. Send the Jews back to Israel. I'm for it. Let's give them back to the dark — garden. Save America. Bury the niggers. We intend to do our part.
>
> Give us our state rights. Freedom for the whites. Nigger will have to fight for every inch he gets from now on.
>
> This is an organizers meeting. We have quite a few members here today which are — we have hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, caucasian race, it's possible that there might have to be some revengeance taken.

---

* *Footnote*: There is some discrepancy as to whether defendant-appellant himself actually made the statements in the first two paragraphs above set forth, or whether they were made by persons that were associated with him.

> We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups – one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

The defendant-appellant was subsequently arrested and indicted for violating *Section 2923.13, Ohio Revised Code (Criminal Syndicalism).*

The defendant-appellant was indicted in September, 1964, but because of motions, continuances and the taking of numerous depositions at his request, trial was not had until November 28, 1966.

At the conclusion of the evidence, and before the Court concluded its charge, and as part of its charge, the Court said:*

> The Court: "* * * Counsel for the State anything to add to the Court's charge?"
>
> Mr. Nikolin: (Counsel for State) "Nothing, your Honor."
>
> The Court: "Counsel for the defendant, anything to add to the Court's charge?"
>
> Mr. Outcalt: (Counsel for the defendant) *"NO, YOUR HONOR."* (P. 219, Transcript)

As a result of that trial, which concluded on December 5, 1966, the jury returned a verdict of "guilty" on both counts of the indictment.

A Motion for a New Trial was overruled and, thereafter, appellant appealed to the Court of Appeals for the First Appellate District of Ohio, and said Court subsequently affirmed the conviction of the lower court.

---

* *Footnote*: Counsel for the appellant initially agreed to have the charge printed in the Appendix but said Appendix did not include the above matter so we are, therefore, quoting from the transcript.

Defendant-appellant then appealed to the Ohio Supreme Court, which affirmed the conviction without an opinion.

An appeal was taken to this Court and jurisdiction was subsequently noted.

ARGUMENT

QUESTION I.

Whether Ohio Revised Code Section 2923.13, prohibiting criminal syndicalism, violates the First and Fourteenth Amendments of the Constitution of the United States?

Counsel in their arguments on Question 1, as they have set it forth in their Brief, have set out the general proposition that the instructions of the Trial Court and the Law of the State of Ohio are to be read as part and parcel of the statutes to be determined. With this interpretation we will concur wholeheartedly. However, what counsel for the defendant-appellant has failed to do is to fully set forth the law of the State of Ohio relative to certain matters involved in this case.

First of all, with regard to the State of Ohio, it is a well settled doctrine in the State of Ohio that an error of omission in a court's charge to a jury will not justify a reversal, especially where counsel has made no request for specific instructions, nor has counsel made any objections to the charge of the Court which was given.

In the case of *State* v. *Cickelli,* 118 O. A. 87, 24 O. O. (2d) 420, 92 O. L. A. 338, 193 N. E. (2d) 409, dismissed for want of a debatable question in 175 O. S. 146, 23 O. O. (2d) 423, 191 N. E. (2d) 803, and further dismissed for want of a debatable question and certiorari denied by this Court in 377 U. S. 128, 12 L. Ed. (2d) 184, 84 S. Ct. 1178, the Court held in the third syllabus that:

> "An error of omission in the court's charge to the jury in a criminal case will not justify a reversal, especially in the absence of any request for further instructions where the parties were given an opportunity to make such a request."

This same general principle was re-affirmed in *State* v. *Tudor,* 154 O. S. 249, as being the law of the State of Ohio.

As can be seen from the Court's charge to the jury, with the addition of a portion of the charge as set forth in our Statement of Facts, which was left out of the Appendix, the defendant in this case, through his counsel not only was not restricted in making an objection to the Court's charge, but the Court specifically asked defense counsel if he had anything to add. To this question the defense counsel replied that he had nothing to add. Accordingly, it is the opinion of the undersigned that the Court, if anything, committed an error of omission, for which defense counsel cannot claim error in this Court in interpreting the statute involved.

Another general presumption of law, as interpreted by the Ohio courts, which we think will be shown to be relevant at a later portion of this Brief, is that the law presumes a man to intend the results and the natural consequences of his acts which are deliberately done. *15 O. Jur. (2d) 31, at page 482.* This same proposition of law has been set forth in the case of *State* v. *Schaffer,* 113 O. A. 125, 17 O. O. (2d) 114, 177 N. E. (2d) 534, and is spelled out in the first part of Syllabus 3 as follows:

> "A person may be presumed to intend results which are the natural, reasonable and probable consequences of his voluntary acts * * *"

Defense counsel in his attack upon the constitutionality of the statute involved has broadened the general attack

not only to include the specific charges for which the defendant in this case was charged by the indictment, but also by including other matters which were not before the Court, either by way of the indictment, the charge of the Court, or any other statement as set forth in the course and conduct of this trial. Specifically I am referring to that portion of the defendant-appellant's Brief which seems to be emphasized on pages 18 and 19 of his Brief, and on which he has argued matters which were never before the Court.

It is true that statute *2923.13, Ohio Revised Code,* does have some commentary about printing, publishing, editing, issuing, or knowingly circulating, etc. books, etc. However, this portion of the statute never was before the Court, and is clearly separable from the portion of the statute upon which the defendant was indicted, upon which the evidence was presented, upon which the Court charged the jury, and upon which the jury returned its verdict. As a general proposition of law, this Court will not determine hypothetical questions, or questions which are not before it. As the Court previously stated in the case of *Communist Party* v. *Subversive Control Board,* as reported in 367 U. S. 1, 81 S. Ct. 1357, and 6 L. Ed. (2d) 625 (1961), at page 674, of the law edition printing:

> "Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated * * * Even where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality. 'Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analagous to rendering an advisory opinion upon a statute or a

declaratory judgment on a hypothetical case' * * * No rule of this court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it'."

With the background as indicated above, we then go to the basic Question No. 1, as proposed in the list of questions presented to this Court. That question is, whether *Ohio Revised Code Section 2923.13,* prohibiting Criminal Syndicalism, violates the First and Fourteenth Amendments of the Constitution of the United States? To this question we reply that *Ohio Revised Code Section 2923.13,* as is applicable in this case, is clearly within the rights of the State of Ohio to pass, and violates none of the constitutional rights of the defendant-appellant herein.

Those portions of *Ohio Revised Code Section 2923.13,* which are relevant to the issues before this Court, and which were applied at the time of trial, are:

Sec. 2923.13 — **ADVOCATING CRIMINAL SYNDICALISM.**

1. "No person shall by word of mouth * * * advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform; * * *"

2. "No person shall voluntarily assemble with any society, group, or assemblage of persons formed to * * * advocate the doctrines of criminal sydicalism. * * *"

It is our humble belief that the above provisions are the only applicable provisions of *Ohio Revised Code Section 2923.13* insofar as this case is concerned.

The Legislature of the State of Ohio has seen fit to define some of the terms as set forth in *Section 2923.13* in *Section 2923.12, Ohio Revised Code,* which says:

> Sec. 2923.12 — **CRIMINAL SYNDICALISM.**
>
> "As used in sections 2923.12 to 2923.15, inclusive, of the Revised Code, 'criminal syndicalism' is the doctrine which advocates crime; satotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform."

Certainly the Ohio statute spells out, with definition and terminology, that, as used in *Section 2923.13,* "advocate" means something more than a discussion of an abstract doctrine. We feel that the Legislature clearly showed its intention in the interpretation of *Section 2923.13* that the word "advocate" means "action" rather than just a general discussion, when the Legislature went on, under *Ohio Revised Code Section 2923.14,* which statute is not before the Court at this time, to say:

> Section 2923.14 — **ASSEMBLAGE FOR TEACHING CRIMINAL SYDICALISM.**
>
> "No person shall, by his presence, aid, or instigation, voluntarily participate in an assembly with one or more others for the purpose of *advocating or teaching the doctrines of criminal syndicalism.* * * *" (Emphasis ours).

Clearly the Legislature in its enactment of *Section 2923.14* has spelled out a specific penal provision whereby a person who discusses or teaches the doctrines of criminal syndicalism might be charged as violating a section of the Ohio Revised Code, namely 2923.14.

In Ohio, as is the case in most states, the law is that in interpreting a statute, the Courts may look to the title which the Legislature has placed on the said statute. As is stated in *50 O. Jur., Section 260, at page 244*:

> "The title of an act may be utilized for determining the purpose which induced the enactment of the law, which purpose may be considered in arriving at a correct interpretation of its terms."

In *50 O. Jur., Section 261, at page 245,* it is stated:

> "In the interpretation of statutes, the title thereof have been declared to be persuasive and entitled to great weight in determining the meaning, but not conclusive."

If, as counsel for the appellant has stated, this statute encompasses a general discussion of certain theories, why did the Legislature subsequently provide in *Ohio Revised Code Section 2923.14* an assemblage for teaching criminal syndicalism. It is also to be noted that *Section 2923.13* says:

> "To teach or advocate the doctrine of criminal syndicalism:

as against *Section 2923.14,* which states:

> "advocating or teaching the doctrine of criminal syndicalism."

It would appear to the undersigned that clearly the Legislature, in the enactment of this statute, especially when it is considered in light of the terminology used in giving a title to the statute of its intention that *Section 2923.13* was an advocacy of action, rather than a discussion, as this Court has previously defined and differenti-

ated the term of "advocacy" in *Yates* v. *United States*, 354 U. S. 298, 1 L. Ed. (2d) 1356, 77 S. Ct. 1064, (1957).

As a general proposition of law, it is the judicial obligation to support the enactment of a law-making body if this can be done. It is the duty of this Court, where constitutional questions are raised, to liberally construe the statute to save it from constitutional infirmities. It is generally presumed that the Legislature, in enacting a statute, did not intend to contravene the constitution, and it is the duty of the Court to so construe a statute as to give the effect, and at the same time preserve the constitution from invasion, if such construction can reasonably be made. This is the general law of the State of Ohio, and we believe the general law in all of the fifty states of the Union. In the case of *Dennis* v. *United States*, 341 U. S. 494, at page 501 (1951), the Court held:

> "The question with which we are concerned here is not whether Congress has such power, but whether the means by which it has employed conflict with the First and Fifth Amendments to the Constitution."

So it is in the statute currently before the Court. The question, I believe, is conceded that the State Legislature has the power, but the sole question is whether the means which it has employed conflict with the First and Fourteenth Amendments to the Constitution of the United States. It is to be pointed out that this Court in numerous cases has upheld the validity of the Smith Act. It is to be further pointed out that although the exact verbiage might be slightly different, the general intent, purpose and verbiage is the same in the Smith Act as in the Ohio statute and as in the New York statute, which was sustained in *Gitlow* v. *New York*, 268 U. S. 625 (1926), and the

California statute which was upheld by this Court in *Whitney* v. *California,* 274 U. S. 357.

The only basic difference between the Ohio statute and the Smith Act is that the Smith Act basically deals with the overthrow of government in the United States by force and violence, whereas under the Ohio law it is the unlawful acts in accomplishing political or industrial reform. It is to be further pointed out that the Ohio statute is somewhat similar to the New York penal law covering criminal anarchy, which was upheld in the case of *People* v. *Epton,* 19 N. Y. (2d) 496 (1967), *certiorari denied* 390 N. S. 29. In that case, and in many cases that have come before the Supreme Court under the Smith Act, and in the case currently before the Court, the appellants contend that the statute was over-broad and was void for vagueness, and violated the constitutional right of freedom of speech. In each of the cases involved the Court upheld the constitutionality of the statute. The Court held that the statute was not over-broad, and the Court held that the statute was not void for vagueness. The defendant-appellant lays great stress upon the decision of this Court in *Keyishian* v. *Board of Regents,* 385 U. S. 589, 87 S. Ct. 675 (1967), in which the Court had before it the statutory scheme of an administrative regulation without benefit of any specific application or interpretation by the courts of the State of New York. This is not the case currently before this Court. The case has a specific application, namely to the specifics of the indictment. The indictment in this case is set forth on page 2 of the Appendix. For the purpose of argument in this Brief we believe that the essential words to be argued in this Brief are, in the first count:

> "unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods

> of terrorism as a means of accomplishing political reform"

and in the second count:

> "did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism * * *"

Ohio Revised Code Section 2923.13 has previously been declared to be constitutional in the case of *State* v. *Kassay*, 126 O. S. 177. The Court, in that case, made the following statements at page 184. Starting out with a defense of the Ohio Bill of Rights, the Court said:

> "Section 11 of the Ohio Bill of Rights provides in part: 'Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.' It is apparent from this language that it does not guarantee the right freely and without restraint to express one's sentiments on every possible subject. It recognizes the responsibility for an abuse of the right. It indicates that there is a limit beyond which one may not go, and that, when that limit is exceeded, he enters the realm of abuse, and therefore the realm of responsibility."

The Court in this case further went on to say, at page 186:

> "The right of free speech is fundamental, but it is not absolute. Its exercise is subject to restriction by legislative authority; if restriction is required in order to protect the state and its people from serious injury."

In a similar criminal syndicalism statute in California, this Court held in *Whitney* v. *California*, 274 U. S. 357, 47 S. Ct. 641, [illegible] L. Ed. 1095 (1926), that the question

of whether or not one attending a Communistic convention intended to assist in the organization of a Communist Party with knowledge of its unlawful character and purpose is one of fact, a finding of which by the jury, affirmed by the reviewing court, is not open to review by the Supreme Court. The Court further held in that case that freedom of speech, which is secured by the Constitution, does not confer an absolute right to speak without responsibility whatever one may choose, or an unrestricted and unbridled license giving immunity to every possible use of language and punishing those who abuse their freedom. We are not arguing against the bare and fundamental rights of freedom of speech, freedom of the press, freedom of peaceable assembly, etc. Nor are we arguing against the cases of *Gitlow* v. *New York,* 268 U. S. 652, 69 L. Ed. 1138 (1924); *De Jonge* v. *Cregan,* 299 U. S. 353; *Herndan* v. *Lowry,* 301 U. S. 242; and many others cited which recite that legal premise. It is to be noted that the Supreme Court was not in those cases confining and restricting itself to just that proposition. On the contrary, in the *Gitlow* case the syllabi state:

> "2. Freedom of speech and of the press, as secured by the Constitution, is not an absolute right to speak or publish without responsibility whatever one may choose or an immunity for every possible use of language.
>
> "3. That a State, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace, is not open to question.
>
> "6. Such utterances present sufficient danger to the public peace and security of the State to bring their punishment clearly within the range of legislative

discretion even if the effect of a given utterance cannot accurately be foreseen.

"7. A State cannot reasonably be required to defer taking measures against these revolutionary utterances until they lead to actual disturbances of the peace or imminent danger of the State's destruction."

And, on page 670 of the Opinion (in *Gitlow*), the Court stated the following, after first upholding the constitutionality of the (New York) statute:

"This being so (the constitutionality of the statute) it may be applied to every utterance — not too trivial to be beneath the notice of the law — which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibition class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition."

In the case of *Bullock* v. *United States*, 265 F. (2d) 683, *certiorari denied* 78 S. Ct. 54, the Court stated that the guarantee of "free speech" does not include the right to persuade others to violate the law. There are too many cases on this subject to cite and here belabor the argument.

Although some of the states' criminal syndicalism statutes are aimed specifically at doctrines pertaining to the overthrow of the government by force, other states have legislated against any advocacy of crime or violence, or unlawful methods of terrorism as a means of accomplish-

ing industrial or political reform. Ohio's statutes fall within the latter group.

It is apparent that almost all of the reported cases, as being supportive of the law on the subject encompassed in this issue, deal with communism, sedition, espionage, and the like. Nevertheless, it is submitted that the principle is the same and, stated in essence, it is, simply, that although the First Amendment prohibits legislation against free speech, it does not give immunity for every possible use of language. (*Frohwerk* v. *United States,* 249 U. S. 204).

In the case of *Yates* v. *United States,* 354 U. S. 298, 1 L. Ed. (2d) 1356, 77 S. Ct. 1064 (1957), the Court reaffirmed the validity of the Smith Act. In particular, the Court went into the definition of the term "advocate" as used in that Statute. The Court refused to declare the Statute unconstitutional on that term. It went on to define the term "advocate" as not being a mere abstract doctrine but to advocate action. In fact, this Court, in that case, indicated that the term covered the advocacy of a future act rather than a limited terminology of an immediate act.

This Court went on to say at page 1378:

> "the essential distinction is that those to whom the advocacy is addressed must be urged to do something now or in the future, rather than merely believe in something."

In the *Yates* case, the Court further stated, at page 1375, L. ed. publication and page 318 of the U. S. Reports:

> "The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this Court * * * The Statute does not penalize the utterance or publication of abstract doctrine or academic discussion, having no quality of

> incitement to any concrete action * * * *It is not the abstract doctrine of overthrowing organized government by unlawful means which is denounced by the Statute, but the advocacy of action for the accomplishment of that purpose* * * *" (Emphasis ours).

The Court went on to say in that case at pages 1376, 1377 L. Ed, and page 321 U. S. Reports:

> "If the government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and committed to a course whereby they will strike when the leaders feel the circumstances permit, action by the government is required. 341 U. S. 509. The essence of the Dennis holding was not that indoctrination of a group in preparation for future violent action as well as exhortation to immediate action, by advocacy found to be directed to 'action for accomplishment' of forcible overthrow, to violence is 'as a rule of principle action', and employing 'language of incitement' id. 341 U. S. 511, 512, is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur * * *".

In conclusion, insofar as Question No. 1 has been presented to this Court, it is the belief of the undersigned that in light of the above authorities, as heretofore set forth, *Ohio Revised Code Section 2923.13*, prohibiting criminal syndicalism in the State of Ohio, does not violate either the First or the Fourteenth Amendment of the United States Constitution.

We accordingly believe that this question should be dismissed as being without merit.

QUESTION II

Whether Ohio Revised Code Section 2923.13, which prohibits criminal syndicalism directed against the State of Ohio is preempted by federal legislation?

Counsel for the defendant-appellant appears to concede the fact that in *Uphaus* v. *Wyman,* 360 U. S. 72, 3 L. Ed. (2d) 1090, 79 S. Ct. 1040 (1959), the Court indicated that the Smith Act and the Federal Acts only excluded state legislation directed toward the overthrow of the United States Government. For the purpose of the record, I would like to quote from the *Uphaus* case at 3 L. Ed. (2d) at page 1096, where the Court stated:

> "The appellant's argument sweeps too broad. In Nelson itself we said that the 'precise holding of the Court * * * is that the Smith Act * * * which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supercedes the enforceability of the Pennsylvania Sedition Act which proscribed the same conduct'. 350 U. S. 499. *The basis of Nelson thus rejects the notion that it stripped the states of the right to protect themselves.* All that the opinion proscribed was a race between federal and state prosecutors to the courthouse door. The opinion made clear that *a state could proceed with prosecution, for sedition against the state itself* * * *" (Emphasis ours)

Counsel once again argues, as it has done in previous parts of its Brief, and takes off on matters not before the Court. Quoting from the first count of the indictment, the defendant is charged with "did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism * * * against the peace and dignity of the State of Ohio".

The second count of the indictment says that the defendant "did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism, contrary * * * and against the peace and dignity of the State of Ohio." The statement in the indictment "against the peace and dignity of the State of Ohio" is more than just a formality, as the defendant-appellant indicates in his Brief. Defense Counsel indicates that the case before the Court is different from the *Uphaus* case, in that in that case the inquiry was directed to the security of the State of New Hampshire, which counsel conceded the Supreme Court was not prepared to hold beyond the reach of the State Government.

It is to be pointed out in the first count of the indictments the words "advocate * * * crime, violence, or unlawful methods of terrorism". It is to be pointed out from the record that the defendant and the persons who were assembled with him wore robes with portions cut out at the eye level so that the persons under the robes could see out, but basically could not be identified by means of facial features. It was further indicated by virtue of the movie that was introduced as an exhibit, and by virtue of the testimony itself:

> "There were several hooded individuals carrying guns that stopped us at that point."
>
> Q. "What kind of guns, sir?"
> A. "Sir?"
>
> Q. "What kind of guns?"
> A. "I recall at least one shotgun and one rifle and I think there was another weapon." (Appendix 9)

It is to be further pointed out that on page 31 of the Appendix, under cross-examination, the following questions and answers took place:

Q. "Now you say that the shotguns and rifles that were out at this place, that they made you, I believe you said nervous?"

A. "Yes, sir."

Q. "You said that they were pointed at you. Is that correct?"

A. "In the same general direction."

Q. "I ask you, sir, did anybody make any threat with reference to any of those weapons to you or Mr. Neuber?"

A. "Not specifically. The threat was implied. Let me put it that way. My interpretation was, just don't do anything out way, those things may be loaded, and I wasn't going to ask."

It is further conceded that among the comments that were made while the men were marching around the burning cross were statements: "Let's give them back to the dark garden." "Bury the niggers." "We intend to do our part." (Appendix 5).

Just where is the "dark garden"? Is that a burial ground? Just where were they going to bury the niggers — using the quotation from the Appendix? Just what were they going to do as they were shouting these amongst other profanities and commentaries, with their guns, and their hoods over their faces so that their facial features could not be determined? It is to be pointed out that all these incidents and commentaries were identified as having been made in Hamilton County, State of Ohio. Certainly defense counsel cannot, at this point, say that to have a person going around with a hood covering his facial features, with a shotgun, a rifle, or another type of weapon, as indicated in the transcript, shouting "Bury the Nigger," "Send the Jews back to Israel", "Let's give them back to the dark garden", "We intend to do our part", "Freedom

for Whites", "Nigger will have to fight for every inch he gets from now on", under any pretense or circumstance or stretch of the imagination, be considered to be solely within the exclusive jurisdiction of the United States Government.

As the Supreme Court indicated, a State may cover and provide for the protection of its own citizens. The statements which were made as the people were marching around, upon which there is some discrepancy as to whether the defendant made any of them, or a part of them, or whether he made all of them (Appendix 42-43), clearly were acts of terrorism in light of the circumstances in which they were made. As indicated by the statements and conduct of the parties involved, these were not mere discussions or teachings of doctrines. These were statements by a small, closely knit group, ready to go out and commit terrorism right then and there and fully capable by the evidence of doing so at the time.

Resort to epithets or personal abuse is not in any sense communication or information or opinion safeguarded by the Constitution of the United States.

It is pointed out that in the charge itself the Court specifically, in reading the indictment, charged the jury that the acts involved were to be unlawful and against the peace and dignity of the State of Ohio. (Appendix, bottom 74 and top 75). If counsel determined that a clear interpretation might have been of some aid to the jury in this matter, counsel could clearly have asked for a further charge on this point. As we have previously indicated, the law of the State of Ohio is clear that the Court will not reverse on errors of omission in a charge where defense counsel has been given the opportunity to request corrections or make additions to the charge. (*State* v. *Cickelli, supra*).

As has been previously pointed out, in that portion of the charge which was printed on page 219 of the transcript, the Court specifically asked defense counsel if he had anything further to add, and defense counsel said nothing. Accordingly, being bound by the laws of the State of Ohio relative to procedures involved, it is the opinion of plaintiff-appellee in this matter that there was definitely terrorism, definitely violence in the making, which would bring this matter within the complete jurisdiction of the State of Ohio to determine.

Accordingly, we respectfully believe that Question No. 2 is without merit in this matter, and accordingly, should be dismissed.

QUESTION III

Whether there was any evidence to sustain a conviction under Section 2923.13 of the Ohio Revised Code, as required by the due process clause of the Fourteenth Amendment?

Counsel for defendant-appellant in his opening argument on this point, which he has raised, says, and I quote:

> "In the absence of *any evidence* whatever to support a conviction, a person who is nevertheless found guilty and convicted is denied due process of law." (Emphasis ours).

We concur with the statement of counsel insofar as this general proposition of law is concerned. Counsel for defendant-appellant, on page 31 of their Brief, does further state:

> "Yet neither the film nor transcript contain *a scintilla of evidence of advocacy of reform through violence* that would have satisfied count 1 * * *" (Emphasis ours).

With this statement of counsel for defendant-appellant we must wholeheartedly disagree, based upon the Appendix as has been submitted to this Court, the transcript and the evidence which was introduced in the trial. Without going into the irrelevant portions of the matter relative to venue, time, place, etc., and limiting our argument to the issues before the Court and more particularly to the statement of counsel that there is no evidence whatsoever to support the findings of the jury in this matter, we herewith submit portions of the record and conclusions as brought forth from the record, as we believe them to have been shown at the time of the trial, and upon which the jury based its findings of guilt, as the defendant was so found on the 5th day of December, 1966.

First of all, by virtue of the evidence as submitted, namely the film, and by the testimony itself, there were several individuals who wore hoods that appeared to be made out of a sheet, with holes for the eyes. (Appendix page 10).

Secondly, several of the hooded individuals were carrying guns, among which were rifles, shotguns and other weapons. (Appendix, page 9). The evidence further indicated that it was the defendant himself who made contact initially with the televison newsman, Harold Leonard, to come and film the activities of the defendant and his associates for dissemination over the local television station to the general public. (Appendix, pages 12, 13, 14). This portion appears to be uncontroverted.

It is also uncontroverted by the testimony and the film that there were men who were armed and were marching around a cross, and that either the defendant, or his associates who were hooded and armed, made the following statements:

"A dirty nigger."

"Let's give them back to the dark garden."

"Bury the niggers."

"We intend to do our part."

"Freedom for the whites."

"Nigger will have to fight for every inch he wants from now on."
(Appendix 25).

Defendant, by his own statement, which is admitted by counsel and is uncontroverted, initially started off one of his speeches with the words "This is an organizers' meeting. We have hundreds of members throughout the State of Ohio * * *" (Appendix, page 24).

Now when one considers that each of the items as set forth above may, or may not, be considered to be a violation of some law, or an overt act toward some act of terrorism, it is the belief of plaintiff-appellee in this matter that the overall facts as presented to the jury clearly gave the jury in this case some evidence upon which they could base their findings in this case. It is a general rule and proposition of law that appellate courts will not reverse, or set aside a judgment, where there is evidence from which the jury could have reached its findings in the matter. When we take all of the above items and put them into the surrounding background and circumstances as existed at the time, it is extremely difficult to come up with an understanding of the defendant-appellant's argument that there was the absence of any evidence whatever to support the conviction, and that there was not a scintilla of evidence of the advocacy of reform through violence. If there was not advocacy of reform through violence, why the hoods that hid the facial features for

identification purposes of the persons who were covered by them? Counsel, no doubt, will come up with some historical reason for the wearing of hoods. However, this is just one facet.

Secondly, if it was supposed to be such a peaceful meeting, in which there was no violence and no terrorism, why the guns? The carrying of guns clearly indicates violence, especially in light of the fact of the hoods hiding the faces of the persons carrying the guns. We especially point out to this Court that, as defendant-appellant has said in the Appendix, this was an organizers' meeting. (Appendix, page 24). Now it might be that we are anticipating a possible argument that there was only a small number involved in this meeting. Defense counsel appears to set forth that argument in other portions of his Brief before this Court. It is to be pointed out that the participants with their hoods, their guns, their profanities and aims clearly were capable right then and there of carrying out terroristic activities to obtain political reform.

What has not been explained, if this was a private meeting on private property, not affecting the general public, as counsel contends, is why did the defendant call in a television newsman and camerman to take the pictures. It is the opinion of plaintiff-appellee in this matter that the basic purpose of the television cameraman and newsman was for the purpose of spreading information to carry out the terrorism and violence and crime necessary to gain the objectives of the group. In the absence of any contradictory evidence, it would seem that this is a fair and logical conclusion that a jury could have reached based upon the evidence.

Counsel for defendant-appellant has stated that we have not set forth any of the purposes of the Ku Klux Klan.

In this case, words of the parties involved speak for themselves. This was an organizers' meeting by defendant-appellant's own admission. Either defendant-appellant, or persons who were working with him, made the statements attributed, which appear on pages 17 and 25 of the Appendix:

"How far is the nigger going to go * * *"

"This is what we are going to do to the niggers * * *"

"A dirty nigger."

"Send the Jews back to Israel — I am for it."

"Let's give them back to the dark garden."

"Bury the nigger."

"We intend to do our part."

"Freedom for the whites."

"Niggers will have to fight for every inch he gets from now on."

It would certainly appear to be stretching the imagination to conclude the commentaries, as indicated, to be academic. Clearly the comments of the associates at this organizers' meeting, and those of the defendant cannot be separated. Clearly when you take all the facts and put them together, the guns, the hoods, the commentary that this is an organizers' meeting, the fact that it is contemplated to be played over television, certainly indicate overt acts.

The words "Bury the niggers", "niggers will have to fight for every inch he gets from now on", "Let's give them back to the dark garden", etc., clearly take the words out of the realm of a general discussion, as against the advocacy and overt acts for which the Ohio statute is aimed at preventing.

Although it is not spelled out at the trial itself, it should

also be considered that at this date in the history of our country there was extreme racial violence. Although this matter was not specifically spelled out, or presented to the jury, we feel that this Court should take judicial notice of the times at which these statements were made, which we believe will give further strength to our argument that the overt acts committed were clearly evident as acts of terrorism. As the Supreme Court stated in the case of *Yates* v. *United States, supra,* at page 1378 of L. Ed.:

> "The essential distinction is that those to whom the advocacy is addressed must be urged to do something now, or in the future, rather than merely join in something."

It would take an extreme stretch of the imagination for someone to believe, based upon the facts as presented to the jury, under the surrounding circumstances and background, that the sole purpose of Brandenburg and his associates, at the time he was speaking and they were marching around the burned cross, they were merely discussing and speaking intellectually, rather than committing overt acts of terrorism.

It is to be specifically pointed out at this time that the defendant did not take the witness stand to state the purpose of his speech. At no time was there any testimony ever offered indicating that advocacy, on the date in question for which the defendant was indicted, was other than an advocacy of action upon the part of the persons present, as well as those persons who observed the conditions and actions on television.

In *DeJonge,* supra, the Court stated that a state statute which punishes participation for the wrongful discussion of public issues can be held under the auspices of an organization which advocates the employment of numerous

means to effect industrial or political changes is repugnant to the due process clause of the Fourteenth Amendment. Clearly as evidenced by the above points of fact, as shown by the Appendix and the record and the film, this was not a meeting for lawful discussion of public issues.

We also believe that the case of *Fiske* v. *Kansas*, 294 U. S. 380 (1921), which the defendant-appellant has cited, is also not applicable in this matter. This was no peaceable assembly as defendant-appellant has indicated. This was an organizers' meeting, with guns, hooded men, prepared to go forth and carry out its purposes, even to the extent of "burying the nigger", as the term was used in the trial.

In conclusion we respectfully request the Court to dismiss Question III as one of the bases upon which the defendant-appellant has filed his appeal.

CONCLUSION

In conclusion, we respectfully submit that those portions of *Ohio Revised Code Sections 2923.12 and 2923.14*, as involved in this case, should be upheld and held to be constitutional, and that the jury finding of guilty of the defendant herein should be sustained, and that the conviction thereon should be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 492

CLARENCE BRANDENBURG,

Appellant,

—v.—

STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

REPLY BRIEF FOR APPELLANT

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ARGUMENT

I.

Failure of Counsel for Defendant to Object to Instructions to the Jury Is Irrelevant to Constitutional Objections to the Act.

Appellee contends that because counsel for defendant raised no objections to the instructions of the trial court to the jury, appellant is barred from claiming error in the interpretation of the statutes involved.

Appellee misunderstands appellant's argument. Appellant relies on the instructions given the jury only as further evidence of an authoritative interpretation of the Act

and as further evidence that the Act is unconstitutional. But these constitutional matters had already been raised and rebuffed by the trial court earlier in the proceedings.[1] In keeping with these earlier rulings, the instructions defined advocacy in the Act as follows: "To advocate means to speak in favor of, defend by argument, to support, vindicate, or recommend publicly" (A. 77-78). As pointed out in appellant's principal brief, this charge was necessarily adopted as the proper interpretation of the Act when the Ohio appellate courts affirmed appellant's conviction.

Appellant has consistently maintained, at trial and on appeal, that the Ohio Act is unconstitutional on its face and as applied. The instructions interpreting the Act reflect its constitutional infirmities and an objection to instructions on the same grounds as the Act itself would have been redundant and must be considered unnecessary in light of the trial court's refusal to entertain such objections earlier in the proceedings.

Even the Ohio case cited by appellee in support of its contention does not lead to appellee's conclusion. A careful reading of *State* v. *Cickelli,* 118 O.A. 87, 24 O.O. 2d 420, 92 O.L.A. 338, 193 N.E. 2d 409, shows that the Ohio Supreme Court in that case did carefully examine the charge, despite the absence of objections. Because there were felt to be no errors of consequence in the charge, the court rejected the appeal on that ground. In the present case infirmities of a grave nature are alleged—that the Act violates the First and Fourteenth Amendments to the Federal Constitution. The vague and overbroad definition of the term "advocate" as well as the unqualified use of

[1] See R. 3, 4.

the term "assembly" invalidate the Act. See *Yates* v. *United States,* 354 U.S. 298 (1957), *Noto* v. *United States,* 367 U.S. 290 (1963). Such grave constitutional errors cannot of course be waived in the manner alleged by appellee.

II.

Advocacy Forbidden by the Ohio Criminal Syndicalism Act Includes Constitutionally Protected Speech.

Appellee and *amicus curiae* contend that advocacy in the context of the Ohio Act excludes advocacy of abstract doctrine and that therefore the Act is neither vague nor overbroad. For the most part they content themselves with mere assertions of this position.

One of the few arguments on which they rest their contention that advocacy is to be read as limited to activities that may constitutionally be prohibited demonstrates their misunderstanding of the constitutional distinction between abstract advocacy and advocacy in the nature of incitement. See *Yates* v. *United States, supra.* They claim that the Act does not proscribe advocacy of abstract doctrine, but rather advocacy of such activities as crime and violence. But the proper constitutional inquiry does not focus on the subject matter being advocated. The crucial question is the nature of the advocacy itself. Any doctrine, no matter how pernicious or distasteful, may be advocated so long as the advocacy is not directed at unlawfully inciting the unlawful activity.[2] Thus, merely setting out the

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[2] As this Court has made clear, the advocacy of illegal conduct has long been recognized as constitutionally protected. In *Kingsley Picture Corp.* v. *Regents,* 360 U.S. 684, 689 (1959) this Court reiterated:

(continued on next page)

subjects, the advocacy of which are prohibited by Ohio, ignores the constitutional issue and fails to meet appellant's objections.

Appellee and *amicus curiae* rely on *Yates* v. *United States, supra,* as supporting the constitutionality of the Ohio Act. But in *Yates* this Court upheld the constitutionality of the Smith Act only after severely limiting the type of advocacy that was prohibited. Ohio has not similarly limited the operative terms of her Act, and this Court may not perform that task since state and not federal legislation is involved.

Appellee contends that *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967) is irrelevant to this case. However, in *Keyishian* this Court considered statutory language that, in relevant aspects, was practically identical to the Ohio Act. In *Keyishian* it was clear that New York was attempting to prohibit or control speech, assembly, and other First Amendment activities. This Court found the statutory language to be vague and overbroad and therefore in violation of the First and Fourteenth Amendments. The similar phraseology in the Ohio Act suffers from the same constitutional infirmities.

"Advocacy of conduct proscribed by law is not, as Mr. Justice Brandeis long ago pointed out, 'a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.' *Whitney* v. *California,* 274 U.S. 357, at 376 (concurring opinion). 'Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech.'"

CONCLUSION

For all the reasons stated above as well as for the reasons discussed in appellant's prior briefs in this Court, appellant's conviction should be reversed.

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BRANDENBURG *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 492. Argued February 27, 1969.—Decided June 9, 1969.

Appellant, a Ku Klux Klan leader, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions refined the statute's definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action. *Held:* Since the statute, by its words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, it falls within the condemnation of the First and Fourteenth Amendments. Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *Whitney* v. *California*, 274 U. S. 357, overruled.

Reversed.

Allen Brown argued the cause for appellant. With him on the briefs were *Norman Dorsen*, *Melvin L. Wulf*, *Eleanor Holmes Norton*, and *Bernard A. Berkman*.

Leonard Kirschner argued the cause for appellee. With him on the brief was *Melvin G. Rueger*.

Paul W. Brown, Attorney General of Ohio, *pro se*, and *Leo J. Conway*, Assistant Attorney General, filed a brief for the Attorney General as *amicus curiae*.

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety

of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Ohio Rev. Code Ann. § 2923.13. He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, *sua sponte,* "for the reason that no substantial constitutional question exists herein." It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. 393 U. S. 948 (1968). We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present

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other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews.[1] Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

> "This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.
>
> "We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

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[1] The significant portions that could be understood were:
"How far is the nigger going to—yeah."
"This is what we are going to do to the niggers."
"A dirty nigger."
"Send the Jews back to Israel."
"Let's give them back to the dark garden."
"Save America."
"Let's go back to constitutional betterment."
"Bury the niggers."
"We intend to do our part."
"Give us our state rights."
"Freedom for the whites."
"Nigger will have to fight for every inch he gets from now on."

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omittted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal. Penal Code §§ 11400–11402, the text of which is quite similar to that of the laws of Ohio. *Whitney* v. *California*, 274 U. S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. Cf. *Fiske* v. *Kansas*, 274 U. S. 380 (1927). But *Whitney* has been thoroughly discredited by later decisions. See *Dennis* v. *United States*, 341 U. S. 494, at 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[2] As we

[2] It was on the theory that the Smith Act, 54 Stat. 670, 18 U. S. C. § 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. *Dennis* v. *United States*, 341 U. S. 494 (1951). That this was the basis for *Dennis* was emphasized in *Yates* v. *United States*, 354 U. S. 298, 320–324 (1957), in which the Court overturned con-

said in *Noto* v. *United States*, 367 U. S. 290, 297–298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." See also *Herndon* v. *Lowry*, 301 U. S. 242, 259–261 (1937); *Bond* v. *Floyd*, 385 U. S. 116, 134 (1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. *Yates* v. *United States*, 354 U. S. 298 (1957); *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931). See also *United States* v. *Robel*, 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime

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victions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

in terms of mere advocacy not distinguished from incitement to imminent lawless action.[3]

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.[4] Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney* v. *California, supra,* cannot be supported, and that decision is therefore overruled.

Reversed.

MR. JUSTICE BLACK, concurring.

I agree with the views expressed by MR. JUSTICE DOUGLAS in his concurring opinion in this case that the "clear and present danger" doctrine should have no place

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[3] The first count of the indictment charged that appellant "did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform . . . ." The second count charged that appellant "did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism . . . ." The trial judge's charge merely followed the language of the indictment. No construction of the statute by the Ohio courts has brought it within constitutionally permissible limits. The Ohio Supreme Court has considered the statute in only one previous case, *State* v. *Kassay,* 126 Ohio St. 177, 184 N. E. 521 (1932), where the constitutionality of the statute was sustained.

[4] Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action, for as Chief Justice Hughes wrote in *De Jonge* v. *Oregon, supra,* at 364: "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." See also *United States* v. *Cruikshank,* 92 U. S. 542, 552 (1876); *Hague* v. *CIO,* 307 U. S. 496, 513, 519 (1939); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 460–461 (1958).

in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites *Dennis* v. *United States*, 341 U. S. 494 (1951), but does not indicate any agreement on the Court's part with the "clear and present danger" doctrine on which *Dennis* purported to rely.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I desire to enter a *caveat*.

The "clear and present danger" test was adumbrated by Mr. Justice Holmes in a case arising during World War I—a war "declared" by the Congress, not by the Chief Executive. The case was *Schenck* v. *United States*, 249 U. S. 47, 52, where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. The pamphlets that were distributed urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. The First Amendment was tendered as a defense. Mr. Justice Holmes in rejecting that defense said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Frohwerk v. *United States*, 249 U. S. 204, also authored by Mr. Justice Holmes, involved prosecution and punishment for publication of articles very critical of the war effort in World War I. *Schenck* was referred to as a conviction for obstructing security "by words of persuasion." 249 U. S., at 206. And the conviction in *Frohwerk* was sustained because "the circulation of the

paper was in quarters where a little breath would be enough to kindle a flame." 249 U. S., at 209.

Debs v. *United States,* 249 U. S. 211, was the third of the trilogy of the 1918 Term. Debs was convicted of speaking in opposition to the war where his "opposition was so expressed that its natural and intended effect would be to obstruct recruiting." 249 U. S., at 215.

> "If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief." *Ibid.*

In the 1919 Term, the Court applied the *Schenck* doctrine to affirm the convictions of other dissidents in World War I. *Abrams* v. *United States,* 250 U. S. 616, was one instance. Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, dissented. While adhering to *Schenck,* he did not think that on the facts a case for overriding the First Amendment had been made out:

> "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country." 250 U. S., at 628.

Another instance was *Schaefer* v. *United States,* 251 U. S. 466, in which Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented. A third was *Pierce* v. *United States,* 252 U. S. 239; in which Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented.

Those then were the World War I cases that put the gloss of "clear and present danger" on the First Amendment. Whether the war power—the greatest leveler of them all—is adequate to sustain that doctrine is debat-

able. The dissents in *Abrams*, *Schaefer*, and *Pierce* show how easily "clear and present danger" is manipulated to crush what Brandeis called "[t]he fundamental right of free men to strive for better conditions through new legislation and new institutions" by argument and discourse (*Pierce* v. *United States*, *supra*, at 273) even in time of war. Though I doubt if the "clear and present danger" test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.

The Court quite properly overrules *Whitney* v. *California*, 274 U. S. 357, which involved advocacy of ideas which the majority of the Court deemed unsound and dangerous.

Mr. Justice Holmes, though never formally abandoning the "clear and present danger" test, moved closer to the First Amendment ideal when he said in dissent in *Gitlow* v. *New York*, 268 U. S. 652, 673:

> "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

We have never been faithful to the philosophy of that dissent.

The Court in *Herndon* v. *Lowry*, 301 U. S. 242, overturned a conviction for exercising First Amendment rights to incite insurrection because of lack of evidence of incitement. 301 U. S., at 259–261. And see *Hartzel* v. *United States*, 322 U. S. 680. In *Bridges* v. *California*, 314 U. S. 252, 261–263, we approved the "clear and present danger" test in an elaborate dictum that tightened it and confined it to a narrow category. But in *Dennis* v. *United States*, 341 U. S. 494, we opened wide the door, distorting the "clear and present danger" test beyond recognition.[1]

In that case the prosecution dubbed an agreement to teach the Marxist creed—a "conspiracy." The case was submitted to a jury on a charge that the jury could not convict unless they found that defendants "intended to overthrow the Government 'as speedily as circumstances would permit.'" 341 U. S., at 509–511. The Court sustained convictions under that charge, construing it to mean a determination of "'whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'"[2] *Id.*, at 510, quoting from *United States* v. *Dennis*, 183 F. 2d 201, 212.

Out of the "clear and present danger" test came other offspring. Advocacy and teaching of forcible overthrow of government as an abstract principle is immune from prosecution. *Yates* v. *United States*, 354 U. S. 298, 318. But an "active" member, who has a guilty knowledge and intent of the aim to overthrow the Government

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[1] See McKay, The Preference For Freedom, 34 N. Y. U. L. Rev. 1182, 1203–1212 (1959).

[2] See *Feiner* v. *New York*, 340 U. S. 315, where a speaker was arrested for arousing an audience when the only "clear and present danger" was that the hecklers in the audience would break up the meeting.

the number of pickets and the place and hours (see *Cox* v. *Louisiana, supra*), because traffic and other community problems would otherwise suffer.

But none of these considerations are implicated in the symbolic protest of the Vietnam war in the burning of a draft card.

One's beliefs have long been thought to be sanctuaries which government could not invade. *Barenblatt* is one example of the ease with which that sanctuary can be violated. The lines drawn by the Court between the criminal act of being an "active" Communist and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees was notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.

This is, however, a classic case where speech is brigaded with action. See *Speiser* v. *Randall*, 357 U. S. 513, 536–537 (DOUGLAS, J., concurring). They are indeed inseparable and a prosecution can be launched for the overt

acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in *Yates* and advocacy of political action as in *Scales*. The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.[3]

[3] See MR. JUSTICE BLACK, dissenting, in *Communications Assn.* v. *Douds*, 339 U. S. 382, 446, 449 *et seq.*